

M Rafiqul Islam
Muhammad Ekramul Haque *Editors*

The Constitutional Law of Bangladesh

Progression and Transformation at its
50th Anniversary



Springer

The Constitutional Law of Bangladesh

M Rafiqul Islam • Muhammad Ekramul Haque
Editors

The Constitutional Law of Bangladesh

Progression and Transformation
at its 50th Anniversary

 Springer

Editors

M Rafiqul Islam
Emeritus Professor of Law
Macquarie University
Sydney, NSW, Australia

Muhammad Ekramul Haque
Department of Law
University of Dhaka
Dhaka, Bangladesh

ISBN 978-981-99-2578-0

ISBN 978-981-99-2579-7 (eBook)

<https://doi.org/10.1007/978-981-99-2579-7>

© The Editor(s) (if applicable) and The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Singapore Pte Ltd.

The registered company address is: 152 Beach Road, #21-01/04 Gateway East, Singapore 189721, Singapore

*Dedicated to
The Constitution of the People's Republic
of Bangladesh
an embodiment of the people being the
fountain of all powers in the Republic*

Foreword

When a country enacts a new constitution, there is no guarantee it will endure. Civil wars, succession struggles, financial crises—shocks like these may cause even the most carefully designed constitution to collapse.

The Constitution of Bangladesh has suffered powerful blows since its enactment in 1972: martial law and a coup d'état. These constitutional jolts would have compelled many countries to discard their constitution and to begin anew. But not in Bangladesh. The Constitution of Bangladesh has proven remarkably resilient. Since its reinstatement in 1991, it has rebounded to be even more durable, more stable, and more robust than before.

The 50th anniversary of the Constitution of Bangladesh is therefore an occasion to celebrate. And there is no better way for a community of scholars to commemorate this landmark moment than with this extraordinary book on the Constitution of Bangladesh. A rich blend of constitutional law, constitutional history, constitutional politics, and constitutional theory, *The Constitutional Law of Bangladesh: Progression and Transformation at Its 50th Anniversary* is an invaluable resource that will become the definitive guide to the Constitution of Bangladesh.

It is no easy feat to imagine, design, and execute a project of this sizeable scale. It requires close familiarity with the intricacies of the Constitution along with a deep appreciation of its underlying values and ambitions, a vast network to invite contributors and an eye for talent in the recruitment of new voices, careful attention to detail and a grand vision for global impact, and strong leadership to keep the team focused on their shared goals. M Rafiqul Islam and Muhammad Ekramul Haque deserve congratulations for shepherding this book from conception to publication.

They also deserve our thanks for bringing this book to the world. It is a gift to scholars of the Constitution of Bangladesh as much as it is a gift to scholars of constitutions more generally.

For scholars like me who research and write in the field of comparative constitutional studies, we are always seeking to expand our field of view beyond the constitutions typically used as comparators. The list of standard referents is well-known: the Constitution of Canada, the Constitution of Colombia, the Basic Law of Germany, the Constitution of India, the Constitution of South Africa, and the United

States Constitution. Relatively few scholars venture beyond these constitutions in their comparative studies of rights and structures. But now, with the publication of *The Constitutional Law of Bangladesh: Progression and Transformation at its 50th Anniversary*, scholars will have at their disposal an excellent, useful, and reputable point of reference to learn about the fascinating constitutional traditions and experiences in Bangladesh. It is my hope that this outstanding book will encourage scholars to feature Bangladesh more often and more prominently in their scholarship in comparative constitutional studies.

As the people of Bangladesh mark the 50th anniversary of their Constitution, they should be proud of their higher law for withstanding traumas that have felled many other constitutions. This is reason both to celebrate the endurance of the Constitution of Bangladesh and to redouble their commitment to its founding values of nationalism, socialism, democracy, and secularism. May the Constitution of Bangladesh continue to endure through its centennial anniversary in 2072.

University of Texas
Austin, TX, USA
richard.albert@law.utexas.edu

Richard Albert

Preface and Acknowledgments

In its immediate post-independence, war-ravaged Bangladesh embarked on the process of introducing constitutional rule of law for its governance. To this end, it enacted a constitution with the participatory parliamentary form of government as its core value. This constitution came into effect on 16 December 1972, the very day in 1971 when the entire territory of the Republic was in physical liberation from Pakistani occupation troops. Since then, its journey has been marked by a turbulent and rollercoaster ride and remained in force for the last 50 years. Notwithstanding its multiple abusive manipulations to serve sectarian selfish political agenda, the enduring survival history of the Constitution over half a century has been remarkable. Its inherent pliancy and resilience in political crises have eventually paved the way for stable governance and economic development and prosperity.

This book is contemplated to commemorate the golden jubilee of the Constitution of Bangladesh and celebrate its 50th anniversary. At this historic juncture, it critically looks back to learn lessons worthy of adoption for the dignified existence of constitutionalism in the future. The collective cutting-edge views of constitutional law scholars ventilated in the book are intended to propel the constitutional rule of law in Bangladesh to a new height in the twenty-first century and beyond. Being the product of extensive research by multiple authors, the book contains substantial amount of case citations, references, and bibliographical sources intended to provide a rich and handy resource base for potential future researchers to embark on and facilitate their research on the progressive development of the constitutional law of Bangladesh.

We, the editors, duly acknowledge the valuable contributions of the authors and are thankful to them all and Professor Richard Albert, William Stamps Farish Professor in Law, Professor of Government, and Director of Constitutional Studies, the University of Texas at Austin, for reading the chapters and writing the “Foreword” for the book despite his extremely busy work schedule and commitments. We acknowledge Azhar U Bhuiyan and Zaid Ekram for their work in copyediting the book. We are grateful to Springer Nature for extending all possible support toward the publication of this book. We are indeed indebted and grateful to our beloved

family members for their kind understanding of our preoccupation with the editing and preparation of the book.

Sydney, NSW, Australia

M Rafiqul Islam

Dhaka, Bangladesh
June 2023

Muhammad Ekramul Haque

Bangladesh Legislation

Academy for Rural Development Act 2017
Air Force Act 1953
Ansar Force Act 1995
Armed Police Battalions Ordinance 1979
Army Act 1952
Biodiversity Act 2017
Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013
Citizenship (Temporary Provisions) Order 1972
Citizenship Act 1951
Constituent Assembly Order 1972
Constitution (Fifteenth Amendment) Act 2011
Constitution (First Amendment) Act 1973
Digital Security Act 2018
East Pakistan Razakars Ordinance 1971
Election Commission Secretariat Act 2009
Environment Conservation Act 1995
Environment Court Act 2010
Flag Vessels (Protection) Act 2019
Foreigners Act 1946
Hindu Religious Welfare Trust Act 2018
International Crimes (Tribunals) (Amendment) Act 2009
International Crimes (Tribunals) (Amendment) Act 2013
International Crimes (Tribunals) Act 1973
Judicial Service (Discipline) Rules 2017
Marine Fisheries Act 2020
National Archives Act 2021
National Environment Policy 1992
Navy Ordinance 1961
Penal Code 1860
Police Act 1861
Primary Education (Compulsory) Act 1992

Proclamation of Independence 1971

Provisional Constitution Order 1972

Road Transport Act 2018

Special Security Forces Act 2021

Telecommunication Regulatory Commission Regulation for Digital, Social Media
and OTT Platforms 2021

Wildlife Conservation and Security Act 2010

Cases

- Abdul Khaleque v Bangladesh (2018) 70 DLR (HCD) 267.
- Abdul Mannan Bhuyia and Ors v The State and Others (2008) 28 BLD (AD) 55.
- Abdul Mannan Khan v Bangladesh (2012) 64 DLR (AD) 1.
- Abdul Mannan Khan v Bangladesh Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No.596 of 2005.
- Abdul Momen Chowdhury and others v Bangladesh and others (2014) 66 DLR (HCD) 9.
- Abdul Quader Molla v Bangladesh, Criminal Appeal No. 24– 25 of 2013, Judgment of 17 September 2013.
- Abdul Quader Molla v Chief Prosecutor, International Crimes Tribunal, Criminal Review Petition Nos. 17-18 of 2013, Judgment of 12 December 2013.
- ACC v HBM Iqbal 15 BLC(AD) 44.
- ACC v Mahmud Hossain 61 DLR (AD) 17.
- ACCM v ATM Nazimulla Chowdhury 62 DLR (AD) 225.
- Adv Zulhas Uddin Ahmed v Bangladesh (2010) 15 MLR (HCD).
- Advocate Asaduzzaman Siddiqui and others v Bangladesh (2016) 24 BLT (Spl) 1 (HCD)
- Advocate Asaduzzaman Siddiqui v Bangladesh (AD) Civil Appeal No.06 of 2017.
- Advocate Salahuddin Dolon v Bangladesh, Writ Petition No. 4495 (2009) 63 DLR (HCD) 80.
- Agrani Bank v Essential Garments Ltd, 26 BLD (AD) 93.
- Ahsanullah, Pearul Islam, Shamsul Karim, Kudrat-E-Elahi Panir v Bangladesh (1992) 44 DLR 179 ('Kudrat-E-Elahi Case').
- Ain o Salish Kendra (ASK) v Bangladesh (1999) 19 BLD 488 (HCD).
- Ain O Salish Kendra and another v Bangladesh, represented by the Secretary, Ministry of Labour and Manpower, and others (Writ Petition No.1234 of 2004), 63 DLR 95.
- AK Mujibur Rahman v Returning Officer & ors 31 DLR (1979) (HCD) 156.
- Al-adsani v the United Kingdom [2001] ECHR, 35763/97.
- Ali Salih Khalaf v Taj Mahal Hotel [2014] 4 Indian Law Journal 20.
- AM Shamsuddin and others v Government of Bangladesh (1994) 14 BLD 418.

- Amnesty International and Commonwealth Lawyers Association v Secretary of State for the Home Department [2005] UKHL 7.
- Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v V R Rudani and others, [1989] AIR 1607 (SC).
- Anwar Hossain Chowdhury v Bangladesh (1989) BLD (AD) (special) 1.
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022.
- Asian Traders v Ministry of Commerce 3 CLR(HCD) 53.
- ASK and BLAST v Bangladesh and others, Writ Petition No. 6373 of 2007.
- ASK v Bangladesh and others, Writ Petition No 8874 of 2021.
- Assaduzzaman Siddiqui and others v Bangladesh, Writ Petition No. 9989 of 2014.
- Associate Provincial Picture House Ltd. v Wednesbury Corporation (1948) 1 KB 223.
- Atif Zareef v The State, Criminal Appeal No.251/2020, Judgment of 4 January 2021.
- Attorney-General for the Province of British Columbia v Attorney-General for the Dominion of Canada [1913] UKPC 63.
- AYM Akramul Hoque v Bangladesh and Ors. (2018) LEX/BDHC/0263/2018.
- Babul Hossain v Bangladesh Writ Petition No 18162 of 2017.
- Aynunnahar Siddiqua and Others v Bangladesh and Others (2017) 37 BLD 181.
- Bandhua Mukti Morcha v Union of India [1984] AIR 802 (SC).
- Bangladesh and Ors v Md. Idrisur Rahman and Ors (2009) 29 BLD (AD) 79.
- Bangladesh and others v BLAST and others (2016) 8 SCOB 1 (AD).
- Bangladesh and others v Md Mushfaqr Rahman and another (2020) 72 DLR (AD) 211.
- Bangladesh Bank and others v. Zafar Ahmed Chowdhury and another 56 DLR (AD) 175.
- Bangladesh Bar Council (BBC) and Ors v A K M Fazlul Karim and Ors (2017) 14 ADC 271.
- Bangladesh Bar Council v AKM Fazlul Karim (2017) 14 ADC 271.
- Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others, Writ Petition No 1430 of 2003.
- Bangladesh Environmental Lawyers Association (BELA) v Government of Bangladesh and Others (2020), WP 1683 of 2014, 2 December 2020.
- Bangladesh Environmental Lawyers Association v Bangladesh (2010) 30 BLD (HCD) 185.
- Bangladesh Italian Marble Works Ltd v Bangladesh (2006 Supl) BLT (HCD) 1 (writ petition No. 6016 of 2000, Judgment of 29 August 2005).
- Bangladesh Legal Aid and Services Trust v Bangladesh and others (2003) 55 DLR 363 (HCD).
- Bangladesh Legal Aid and Services Trust and another v Secretary, Ministry of Education, Bangladesh and others, (2011) 63 DLR (HCD) 643.
- Bangladesh Legal Aid and Services Trust and Others v Government of Bangladesh and Others, Writ Petition No.5863 of 2009, 39 CLC (HCD) 2010.

- Bangladesh National Women Lawyers' Association v Bangladesh (2009) 29 BLD (HCD) 415.
- Bangladesh Paribesh Andolon v Bangladesh and others (2006) 58 DLR 441 (HCD).
- Bangladesh Retired Government Employees Welfare Association and others v Bangladesh (1994) 46 DLR 426 (HCD).
- Bangladesh Sangbadpatra Parishad v Bangladesh (1991) 43 DLR 126 (AD).
- Bangladesh Soya-Protein Project Ltd. v Secretary, Ministry of Disaster Management and Relief, Bangladesh Secretariat, Dhaka (2001) LEX/BDHC/0184/2001.
- Bangladesh v Advocate Zulhas Uddin [2010] 39 CLC (AD).
- Bangladesh v Asaduzzaman Siddiqui (2019) 71 DLR (AD) 52.
- Bangladesh v Gazi Shafiqul and Others 19 BLC(AD) 163.
- Bangladesh v Md Roushan Mondal alias Hashem, (Death Reference No. 5 (2004) 59 DLR 72.
- Bangladesh v Nurul Amin and Others [2015] 3 CLR(AD) 410.
- Bangladesh v Prof. Golam Azam (1994) 46 DLR (AD) 192.
- Bangladesh v Professor Nurul Islam (2016) 68 DLR (AD) 378.
- Bangladesh v. Md. Azizur Rahman, 46 DLR (AD) 19.
- Banu v Bangladesh, Writ Petition No. 7297 of 2019, HCD, 31 December 2020.
- Barcelona Traction, Light and Power Company, Limited (Belgium v Spain), Second Phase, Judgment of 5 February 1970, 1970 ICJ Reports 3.
- BELA v Bangladesh (2003) 55 DLR 69.
- BELA v Government of Bangladesh and others (WP No 4604 of 2004, HCD, 27 July 2005).
- BELA v Government of Bangladesh and others (WP No 4958 of 2009, HCD, 14 January 2010).
- Belgium v Senegal [2012] ICJ Reports 422.
- BESHR v Bangladesh (2001) 53 DLR 1.
- Bilkis Akhtar Hossain v Bangladesh (1997) 17 BLD 395.
- BLAST and ASK v Bangladesh and Ors, Suo Moto Order No. 248 (2003)11 BLT (HCD) (2003) 281.
- BLAST and ASK v Bangladesh and others, Writ Petition No. 5684 of 2010.
- BLAST and others v Bangladesh and others, Writ Petition No. 7878 of 2014.
- BLAST and others v Government of Bangladesh and others (2011) 16 MLR 61 (HCD).
- BLAST v Bangladesh (2008) 60 DLR 749.
- BLAST v. Bangladesh and others, Writ Petition No. 3139 of 2011.
- BNWLA v Bangladesh (2009) 29 BLD 415.
- BNWLA v Bangladesh and others (2011) 31 BLD 324 (HCD).
- Bulankulama v Ministry of Industrial Development (2000) LKSC 18.
- Children's Charity Bangladesh Foundation v Bangladesh and others (2017) 5 CLR 278 (HCD).
- Conforce Limited v Titas Gas Transmission & Distribution Co. Ltd (1990) 42 DLR (HCD) 33.
- Dalia Parveen v. Bangladesh Biman Corporation (1996) 48 DLR (HCD) 132.
- Dehradun v State Uttar Pradesh AIR 1987 SC.

- Dr Mohiuddin Farooque v. Bangladesh 55 DLR (HCD) 69.
- Dr Mohiuddin Farooque v Bangladesh, Writ Petition No. 891 of 1994, HCD.
- Dr Mohiuddin Farooque v Bangladesh and Others (1997) 49 DLR (AD) 1.
- Dr Mohiuddin Farooque vs Bangladesh and others, Writ Petition No. 948 of 1997, HCD.
- Dr. Jamshed Bakht v Murad Ahmed 1982 BLD (AD) 154.
- Dr. Mohiuddin Farooque (Sekandar Ali Mondal) v Bangladesh (1998) 50 DLR (HCD) 84.
- Dr. Mohiuddin Farooque v Bangladesh, Writ Petition No. 1783 of 1994, HCD.
- Dr. Mohiuddin Farooque v Bangladesh and Others (1996) 48 DLR (HD) 438.
- Dr. Mohiuddin Farooque v Bangladesh and Others, Writ Petition No. 300 of 1995.
- Dr. Mohiuddin Farouque v Bangladesh and Others, (2003) 55 DLR (HCD) 69.
- Ekushey Television Ltd v Dr Chowdhury Mahmud Hasan and others (2003) 53 DLR 26 (AD).
- Ershad v Bangladesh and Others (2001) 21 BLD (AD) 69.
- Expelled Dominicans and Hitians v Dominican Republic [2014] Series C, No. 282.
- Faizul Islam (Md) v Bangladesh (2016) Writ Petition No. 10127 of 2015.
- Farida Akhter and others v Bangladesh (2006) 11 MLR (AD) 237.
- Faridul Alam v Bangladesh (2010) 18 BLT 323.
- Fisheries Jurisdiction (UK v Iceland), Merits, Judgment, 1974 ICJ Reports 3.
- Francis Coralie v Union Territory of Delhi, A.I.R. 1981 SC 746.
- Georgia v Russia [2014] GC, No 13255 of 2007.
- Secretary Ministry of Home Affairs v Ahmed Nazir (1975) 27 DLR 41 (AD).
- Haji Jaynal Abedin v Bangladesh (1980) 30 DLR 71.
- Haji Md. Shah Alam v Government of Bangladesh, Writ Petition No. 4722 of 2009.
- Herzog et al v Brazil [2018] IACHR, Series C, No. 3.
- HM Ershad v Bangladesh (2005) II ADC 371.
- HRPB v Bangladesh v Bangladesh and others, Writ Petition No. 13989 of 2016, HCD, 30 January 2019 and 3 February 2019).
- Human Rights and Peace for Bangladesh v Bangladesh and others, Writ Petition No. 3503 of 2009, HCD, 21 March 2010).
- Human Rights and Peace for Bangladesh v Bangladesh (2010) 22 BLC 48.
- Human Rights and Peace for Bangladesh v Bangladesh, Writ Petition No. 13989 of 2016.
- Human Rights and Peace for Bangladesh v Bangladesh, Writ Petition No. 4242 of 2009.
- Human Rights and Peace for Bangladesh v Bangladesh, Writ Petition No.11499 of 2014.
- ICTY Appeals Chamber, Prosecutor v. Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1, ICTY Appeal, 2 October 1995.
- Jahangir Hawladar v CMM (2006) 58 DLR 106.
- Jamil Haque v Bangladesh (1982) 34 DLR (AD) 125.
- Kazi Mamunur Rashid v Bangladesh 28 BLD (2008) (HCD) 87.
- Kazi Mukhlesur Rahman v Bangladesh (1974) 3 CLC 1181 (AD).
- Kazi Mukhlesur Rahman v Bangladesh and Another (1974) 26 DLR (AD) 44.

- Keshavananda v State of Kerala, AIR 1973 SC 1461.
- Khandakar Ehtesamuddin Ahmed v Bangladesh (1978) 30 DLR (AD) 154.
- Khandakar Mostaque Ahmed v Bangladesh (1982) 34 DLR (AD) 222.
- Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd (2010) 63 DLR (AD) 298.
- Khondker Delwar Hossain v. Bangladesh Italian Marble Works Ltd., Dhaka and others, (2009) Civil Petition for Leave to Appeal Nos 1044 and 1045.
- Khushi Kabir and Others v Bangladesh and Others, Writ Petition No. 3091 of 2000.
- Kudrat-E-Elahi Panir v Bangladesh (1992) 44 DLR (HCD) 179.
- Liberty Fashion Wears Limited v Accord Foundation (2018) 6 CLR 107 (HCD).
- Lillu Alias Rajesh and Others v State of Haryana (2013) 14 SCC 643.
- Louis De Raedt v Union of India [1981] AIR SC 1886.
- Luther v Borden (1849) 48 US (7 How) 1.
- M Asafuddowlah v Bangladesh (2021) 15 SCOB 12 (HCD).
- M Saleem Ullah v Bangladesh, (2005) 57 DLR (HCD) 171.
- M C Mehta v State of Tamil Nadu and Others (1996) 6 SCC 756.
- M C Mehta v Union of India and Others 1987 AIR SC 1086.
- Maganbhai Ishwarbhai Patel v Union of India [1969] AIR SC 783.
- Mahbulul Anam v Ministry of Land (2020) 72 DLR (AD) 239.
- Mainul Hosein & others v Sheikh Hasina Wazed (2001) 53 DLR (HCD) 138.
- Malik Brothers v Narendra Dadich, 1999 AIR SC 3211.
- Managing Committee of Mohammadpur Girls High School v Fazlur Rahman Kahn and Others 39 DLR 355.
- Mario AlferodoLares-Reyes et al v US [2002] IACHR, Case 12379, Report No. 19/02, 27.
- Masdar Hossain v Bangladesh (1998) 13 BLD (HCD) 558.
- Md Ruhul Quddus v Government and others (2019) 7 CLR 665 (HCD).
- Md Rustom Ali and others v The State (2017) 5 CLR 154 (AD).
- Md. Abid Khan and others v Bangladesh (2003) 55 DLR 318.
- Md. Tarikul Islam and Ors. v Bangladesh and Ors (2017) LEX/BDHC/0380/2017.
- Metro Makers and Developers Limited v Bangladesh Environmental Lawyers Association (2013) 65 DLR (AD) 181.
- Mohammad Shujat Ali v Union of India, 1974 AIR SC 1631.
- Mohammad Tayeeb, Moulana Abul Kalam Azad v Bangladesh/Secretary, Ministry of Religious Affairs and Ors, Civil Appeal No. 593 and 594 of 2001 (AD) 12 May 2011.
- Mohammad Zahirul Islam v Bangladesh and Ors, Writ Petition No. 5508 of 2017 (HCD).
- Mosammat Nasrin Akhter and others v Bangladesh, Writ Petition No. 6309 of 2003.
- Mostafa Kamal Sazu and Ors v Secretary, Ministry of Finance, Bangladesh Secretariat, and Ors. (2014) LEX/BDHC/0141/2014.
- Moudud Ahmed v Anwar Hussain Khan (1995) BLD (AD) 12.
- Moulana Md Abdul Hakim v Bangladesh (2018) 10 SCOB 71 (HCD).
- Mridha Trade International v Secretary, Ministry of Commerce 3 CLR(HCD) 65.
- Muhammad Abdullah Saleh Al-Asad v Djibuti [2014] ACHR, No. 383/10.

- Muhammad Zahir Uddin v Bangladesh, Writ Petition No. 3278 of 2020 (HCD).
 Mukesh Kumar v State of MP, AIR 1985 SC 1363.
 Munn v Illinois (1877) 94 US 113.
 Myers v United States (1926) 272 US 52.
 Nait-Liman v Switzerland [2018] ECHR, 51357/07.
 Nasiruddin v Bangladesh (1980) 32 DLR (AD) 216.
 National Board of Revenue v Abu Sayeed Khan (2013) 18 BLC 116 (AD).
 National Board of Revenue v Abu Saeed Khan and Others (2013) 18 BLC (AD) 116.
 Nevsun Resources Ltd v Araya [2020] SCC 5.
 Nilabati Behara v State of Orissa AIR 1993 SC 1960.
 Nishat Jute Mills Limited v HRPB, CPLA No 3039 of 2019 (AD), 17 February 2020.
 Nishat Jute Mills Limited v Human Rights and Peace for Bangladesh, Civil Petition for Leave to Appeal No. 3039 of 2019.
 Nuruzzaman v Government of Bangladesh, Writ Petition No. 10307 of 2007.
 Oali Ahad v Government of Bangladesh (1974) 26 DLR 376.
 Professor Dr A.F.M. Masud v Secretary, Ministry of Housing & Public Works, Writ Petition No. 1058 of 2011.
 Professor Nurul Islam v Bangladesh (2000) 52 DLR 413
 Professor Syed Ali Naki and others v Bangladesh and others (2016) 36 BLD 417 (HCD).
 Prosecutor v Balaskic [2004] ICTY, IT-94/14-A
 Prosecutor v Delic et al [1998] ICTY, IT-96-21-T.
 Prosecutor v Furundzija [1998] ICTY, IT-95-17/1-T.
 Prosecutor v Lordic and Cerkez [2004] ICTY, IT -95-14/2-A.
 Prosecutor v Simic [2002] IT-95-9/2-S.
 R (Daly) v Secretary of State for the Home Department (2001) UKHL 26, 49.
 R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan (1993) 1 WLR 909.
 R v Lloyd's of London, ex parte Briggs (1993) 1 Lloyd's Rep 176.
 R v Panel on Take-overs and Mergers (1987) QB 815.
 Rabiya Bhuiyan, MP v Ministry of LGRD and Others (2007) 59 DLR (AD) 176.
 Raja Sri Sri Durga Prasad Singh v Braja Nath Bose and others (Fort William (Bengal) [1912] UKPC 20.
 Rana Surong v Bangladesh and Ors (2020) 72 DLR (AD) 153.
 Re an Application of Mr Habibul Islam Bhuiyan, President, Supreme Court Bar Association (1999) 19 BLD (AD) 93.
 Regina v Chief Constable of Sussex ex p ITF (1999) 1 All ER 129.
 RMMRU v Bangladesh Writ Petition No. 10504 of 2016.
 Rokeya Akhter Begum v Bangladesh and others (2018) 6 CLR 206 (HCD).
 Ruhul Shah v State of Bihar and another AIR 1983 SC 1086.
 Scott v Scott (1913) AC 417.
 Secretary of State for India in Council v Sri Raja Chelikani Rama Rao and others (Madras) [1916] UKPC 58.
 Secretary of State for India v Raja Jyoti Prashad Singh Deo Bahadur [1926] UKPC 18.

- Secretary, Ministry of Finance, Government of Bangladesh v Md. Masdar Hossain & Ors (2000) 20 BLD (AD) 104.
- Shafiqul Islam v Bangladesh (2004) 56 DLR 239.
- Shah Abdul Hannan and Ors v Bangladesh (2011) 16 BLC (HCD) 386.
- Shah Abdul Hannan v Bangladesh (2011) 16 BLC 386.
- Sharif N Ambia v Bangladesh and Ors (WP No 937 of 1995, HCD, 6 February 2000.
- Shehla Zia v WAPDA, PLD 1994 SC 693.
- Sheikh Abdus Sabur v Returning Officer, District Education Officer-in-charge, Gopalgong, 41 DLR (AD) 30.
- Siddique Ahmed v Bangladesh (2011) 33 BLD (HCD) 84.
- Siddique Ahmed v Bangladesh, Writ Petition No. 696 of 2010.
- Sifat Mahmud v Bangladesh (2017) 5 CLR 276 (HCD).
- SM Zillur Rahman v Bangladesh (2004) 56 DLR (AD) 127.
- Smith and Grady v UK (1999) 29 EHRR 493.
- Southern Solar Power Ltd and another v Bangladesh Power Development Board and others LEX/BDHC/0218/2019.
- South-West Africa case [1966] ICJ (second phase judgment) ICJ Reports 6.
- SP Gupta and others v Union of India [1982] AIR SC 149.
- State of HP v Parents of Students Medical College, AIR 1985 SC 910.
- State of West Bengal v Sampal Lal, AIR 1985 SC 195.
- State v Deputy Commissioner, Satkhira and others (1993) 45 DLR 643 (HCD).
- State v Dosso (1958) 10 PLD (SC).
- Sultan Ahmed v Chief Election Commissioner (1978) 30 DLR 291.
- Tamanna Ferdous v Bangladesh and Ors, Writ Petition No. 7372 of 2021, 7 November 2021.
- Tanzeen Bristy v Bangladesh and Ors, Writ Petition No. 6049 of 2011, 8 October 2020.
- Tayeeb and Ors v Bangladesh (2015) 67 DLR (AD) 57.
- Teitiota v New Zealand [2019] No. 2728/2016.
- Hussain Mohammad Ershad v Bangladesh, 53 DLR (2001) 102.
- The Queen v The Earl of Northumberland (1567) 1 Plowden 310.
- Unique Hotel & Resorts Ltd v Bangladesh (2010) 15 BLC 770.
- United States v. California 332 US 19 (1947).
- Vasquez v Hillery (1986) 474 US 254.
- Vineet Narain v Union of India [1996] AIR 3386 (SC).
- Vishaka and Others v State of Rajasthan 1997AIR SC 30.
- Vishwa Lochan Madan v Union of India 2014 AIR SC 2957.
- Women Victims of Sexual Torture in Atenco v Mexico [2018] IACHCR, Series C. No.371.
- ZI Khan Panna v Bangladesh and others (2017) 37 BLD 271 (HCD).

Contents

1	Introduction: Fifty Years of the Constitution of Bangladesh: Progression and Transformation	1
	M Rafiqul Islam and Muhammad Ekramul Haque	
1.1	The Constitutional Journey of Bangladesh	1
1.2	Borrowing from Comparative Constitutional Law by the Constituent Assembly	4
1.3	Influence of Comparative Constitutional Law: Constitutional Transplants by the Judiciary.	6
1.4	National, Regional, and International Relevance of the Book.	10
1.5	The Way Forward: Challenges and Roadmap of Reforms for Future Constitutionalism	11
1.6	Compiling and Summarising Chapter Abstracts	14
	References	21
 Part I Constitution-Making, Changes and Philosophy		
2	The Making of the Constitution of Bangladesh and Making It Work	27
	Kamal Hossain	
2.1	Introduction	27
2.2	Making of the Constitution: The Ecstasy.	29
2.3	Making the Constitution Work: The Agony.	36
2.4	Need for Renewed National Effort to Make the Constitution Work	38
	References	40
3	Constituent Assembly Debates on the Bangladesh Constitution: Intentions, Insight, and Implementation	43
	Md Nazrul Islam	
3.1	Introduction	44
3.2	Context and Consultations.	45

3.3	CA Debates on Fundamental Principles	47
3.4	Decades of Experience.....	57
3.5	Concluding Remarks	61
	References	62
4	Secularism as a State Policy, State Religion, and Minority Rights in the Constitution: Benign or Malign for Communal Harmony in Bangladesh?	65
	Mohammad Golam Sarwar	
4.1	Introduction	65
4.2	The Meaning of Secularism in Bangladesh.....	66
4.3	The Context and Journey of Secularism	69
4.4	The Deviation: Removal of Secularism from the Constitution ..	70
4.5	The Revival of Secularism.....	72
4.6	Concurrent Position of State Religion and Secularism: Complementary or Contradictory?	73
4.7	Secularism Along with State Religion: Implications for Minority Rights and Communal Harmony.....	75
4.8	Conclusion	79
	References	80
5	Constitutional Recognition of Customary International Law in Bangladesh	83
	Nakib M Nasrullah	
5.1	Introduction	84
5.2	Relevancy of International Law to Constitution-Making	85
5.3	Constitutional Recognition of Customary International Law: Nature and Approach	87
5.4	Recognition of Customary Principles in the Constitution of Bangladesh.....	89
5.5	Conclusion	99
	References	100
6	Constitutional Changes in Bangladesh: Underscoring the Need for Public Participation in the Process	103
	Naveed Mustahid Rahman	
6.1	Introduction	103
6.2	Public Participation and Amendments to Democracy and Secularism.....	105
6.3	Augmenting Public Participation in the Constitutional Processes	111
6.4	Conclusion	116
	References	116

Part II Organs of the State, Constitutional Institutions and Their Functions

7 Role of Parliament in Ensuring Democratic Accountability in Bangladesh: Setting the Agenda for a Strengthened Parliamentary System	121
Abdullah Al Faruque	
7.1 Introduction	121
7.2 Dimensions of Parliamentary Accountability	123
7.3 Scenario of Legislative Practice in Bangladesh	132
7.4 Agendas for Reform for Strengthening Parliament	134
7.5 Conclusion	135
References	136
8 Constitutionalisation of Good Governance and Human Rights: Where Does Bangladesh Stand at Fifty Years?	139
Sumaiya Khair	
8.1 Introduction	139
8.2 The Bangladesh Constitution on Human Rights and Good Governance	141
8.3 Drivers of Good Governance and Human Rights: State and Non-state Actors	143
8.4 Fifty Years Down the Line: Factors Impeding Constitutional Safeguards of Good Governance and Human Rights	144
8.5 Conclusion	152
References	153
9 Mechanisms for Judicial Accountability in the Contemporary World: Whither Bangladesh?	157
Sarkar Ali Akkas	
9.1 Introduction	158
9.2 Various Mechanisms for Judicial Accountability	158
9.3 Disciplinary Mechanism in Practice	161
9.4 Mechanisms for Disciplining Judges in Bangladesh	165
9.5 Conclusion	170
References	171
10 Fifty Years of Electioneering in Bangladesh: The Collapse of a Constitutional Design	173
M Jashim Ali Chowdhury	
10.1 Introduction	173
10.2 Theoretical Framework	175
10.3 Power Perpetuation and ‘Preventive Representation’ in Bangladesh	177

10.4	‘Democratic Instrumental Vision’ and Deinstitutionalised Electoral Reforms	181
10.5	Conclusion	187
	References	189

Part III Specialised Constitutional Rights and Issues

11	Restrictions on the Constitutional Fundamental Rights in Bangladesh: Wednesbury Unreasonableness and Proportionality	197
	Azhar Uddin Bhuiyan	
11.1	Introduction	198
11.2	Constitutional Framework in Bangladesh for Restrictions on Fundamental Rights	199
11.3	Tests for Reviewing Restrictions on FRs	202
11.4	The Approach of the SCOB	206
11.5	Justifying the Borrowings of Proportionality	208
11.6	Conclusion	210
	References	210
12	Protection Through Constitutional Guarantees: The Case of Women, Children, and Backward Sections of the People	213
	Borhan Uddin Khan and Md Al Ifran Hossain Mollah	
12.1	Introduction	214
12.2	Women’s Rights Through Vernacular: A Tale of Success, Struggle, and Compromise	216
12.3	Children’s Rights in the Constitution: Towards a Progressive Direction	219
12.4	Understanding Backward Sections of the People: The Discord and Discontent Within	221
12.5	Conclusion	225
	References	226
13	The ‘International Crimes’ Exception to the Fundamental Rights Regime of the Bangladesh Constitution	229
	Quazi Omar Foysal	
13.1	Introduction	230
13.2	The Justifications for Incorporating the ‘International Crimes’ Exception	231
13.3	The Scope of the ‘International Crimes’ Exception	232
13.4	The Consequence of the ‘International Crimes’ Exception	239
13.5	Conclusion	243
	References	246

14	Environmental Constitutionalism in Bangladesh: From Recognition to Practice in the Twenty-First Century	249
	Shawkat Alam and S M Atia Naznin	
14.1	Introduction	249
14.2	Understanding Environmental Constitutionalism	251
14.3	Recognition and Development of Environmental Constitutionalism	253
14.4	Environmental Constitutionalism in Bangladesh: From an Implied Constitutional Right to Article 18A	257
14.5	Implementing Article 18A and the Way Forward	261
14.6	Conclusion	263
	References	264
15	Towards a Constitutional Law Framework for Foreign Direct Investments and Intellectual Property Rights Reform: The Case of Bangladesh	267
	Shima Zaman and Rumana Islam	
15.1	Introduction	267
15.2	Contextual Background of the Legal Regime of FDI in Bangladesh	268
15.3	Contextual Background of the Legal Regime of IP in Bangladesh	275
15.4	Conclusion	280
	References	281
16	Refugee Protection Under the Constitution of Bangladesh: The Rohingya Refugees in Context	283
	Jobair Alam	
16.1	Introduction	283
16.2	Refugee Protection	284
16.3	Refugee Protection Through Constitutional Provisions	285
16.4	The Scope of The Rohingya Refugee Protection in the Constitution of Bangladesh	287
16.5	Solutions to the Rohingya Refugeehood in the Constitution of Bangladesh Through Local Integration	292
16.6	Conclusion: Ensuring Rohingya Refugee's Protection Through the Constitution	295
	References	297
17	Ocean Governance, Blue Economy and the Constitution of Bangladesh: Emerging Rights of the People and Nature	299
	Md Saiful Karim	
17.1	Introduction	299
17.2	Conceptual Framework	300
17.3	Environmental Rights of the People, Public Trust, and Rights of Nature in Bangladesh	302

17.4	Constitutional Provisions on the Marine Area	306
17.5	The Constitution and Non-Living Resources: Historical and Contemporary Contexts	308
17.6	Ocean-Dependent People, Marine Living Resources and the TWMZ Act	311
17.7	Conclusion	313
	References	314
18	Digital Constitutionalism in Bangladesh to Protect Right to Privacy in the Big Data Regime	317
	Md Saimum Reza Talukder	
18.1	Introduction	317
18.2	Right to Privacy in the Big Data Regime	320
18.3	Rights-Based Principles to Protect Right to Privacy in the Big Data Regime	323
18.4	Digital Constitutionalism	325
18.5	Digital Constitutionalism in Bangladesh to Protect the Right to Privacy	328
18.6	Conclusion	331
	References	332
Part IV Constitutional Remedies		
19	Economic, Social and Cultural Rights: Transformation of Non-justiciable Constitutional Principles to Justiciable Rights in Bangladesh	337
	Muhammad Ekramul Haque	
19.1	Introduction	338
19.2	Judicial Enforcement of Non-justiciable Constitutional Principles	339
19.3	Conclusion	349
	References	350
20	The Writ Jurisdiction in Bangladesh: In Search of a Consistent Procedural Framework	353
	Md Abdul Halim	
20.1	Introduction	354
20.2	Writ Jurisdiction and Judicial Review	355
20.3	Constitutional Framework of Writ Jurisdiction of the Supreme Court of Bangladesh	356
20.4	Interim, Consequential and Main Relief in Writ Jurisdiction: An Area of Great Uncertainty	359
20.5	Conclusion	364
	References	365

21	Emergency Powers and Martial Law Under the Constitution of Bangladesh	367
	M Ehteshamul Bari	
21.1	Introduction	368
21.2	The Emergency Provisions Under the Constitution of Bangladesh 1972	372
21.3	The Proclamation of Emergency in January 2007	375
21.4	The Impact of the 2007 Proclamation of Emergency on the Fundamental Rights	376
21.5	Declarations of Martial Law in 1975 and 1982	377
21.6	Judicial Response to the Declarations of Martial Law and Proclamations of Emergency	381
21.7	The Changes Introduced to the Constitution in 2011 to Obviate the Possibility of Subversion of the Constitution.	382
21.8	Conclusion	382
	References	383
22	Judicial Lawmaking in Bangladesh: Looking Back and Into the Future.	387
	Md Rizwanul Islam	
22.1	Introduction	387
22.2	The SCB Staying Off Judicial Lawmaking	389
22.3	Judicial Law Making with Little or No Direct Textual Basis	391
22.4	Judicial Lawmaking While Interpreting.	395
22.5	The SCB as a Proposer of Lawmaking or Law Reform	396
22.6	What Does Tomorrow Hold?	397
22.7	Conclusion	398
	References	399
23	Public Interest Litigation and the Constitution of Bangladesh: Past, Present, and Future	401
	Ali Mashraf and Tahseen Lubaba	
23.1	Introduction	401
23.2	Origin of PIL	402
23.3	Use of PIL and Establishment of Rights After <i>Fap 20</i> and Present Scenario	407
23.4	Roadblocks and Hurdles: Evaluating the Efficacy of PILs	415
23.5	Conclusion: A Roadmap to Address the Present Challenges.	417
	References	419
	Index	421

Abbreviations

AD	Appellate Division
AL	Awami League
APTA	Asia-Pacific Trade Agreement
ASK	Ain O Salish Kendra
BAKSAL	Bangladesh Krishak Sramik Awami League
BIDA	Bangladesh Investment Development Authority
BIT	Bilateral Investment Treaty
BLAST	Bangladesh Legal Aid and Services Trust
BNP	Bangladesh Nationalist Party
CA	Constituent Assembly of Bangladesh
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CJ	Chief Justice
COP	Combined Opposition Party
CPR	Civil and Political Rights
CrPC	Code of Criminal Procedure 1898
DD	Dismiss for Default
DIHU	Darul Ihsan University
DSB	Dispute Settlement Body
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
ESCR	Economic, Social, and Cultural Rights
FDI	Foreign Direct Investment
FIR	First Information Report
FoC	Framers of the Constitution
FPSP	Fundamental Principles of State Policy
FR	Fundamental Rights
GDP	Gross Domestic Product
HCD	High Court Division
HDI	Human Development Index
ICAO	International Civil Aviation Organization

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICSID	International Center for Settlement of Investment Disputes
IMO	International Maritime Organization
IP	Intellectual Property
ISDS	Investor State Dispute Settlement
JI	Jamaat e Islami
JP	Jatiya Party
LDC	Least Developed Country
LMA	Law Making Authority
MIGA	Multilateral Investment Guarantee Agency
MOU	Memorandum of Understanding
MP	Member of Parliament
NCBC	National Commission for Backward Classes
NGO	Non-government Organization
NGOAB	NGO Affairs Bureau
NPCG	Non-party Caretaker Government
NWDP	National Women Development Policy
NSDS	National Sustainable Development Strategy
OBC	Other Backward Class
OSSC	One Stop Service Center
PSC	Public Service Commission
PT	Proportionality Test
RSD	Refugee Status Determination
SAFTA	South Asian Free Trade Agreement
SCB	Supreme Court of Bangladesh
SDG	Sustainable Development Goal
SEBC	Socially and Educationally Backward Class
SJC	Supreme Judicial Council
TWMZ	Territorial Waters and Maritime Zones
UDHR	Universal Declaration of Human Rights
UDI	Unilateral Declaration of Independence
UK	United Kingdom
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugee
UNHRC	United Nations Human Rights Committee
USA	United States of America
WB	World Bank
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WUT	Wednesbury Unreasonableness Test

Chapter 1

Introduction: Fifty Years of the Constitution of Bangladesh: Progression and Transformation



M Rafiqul Islam and Muhammad Ekramul Haque

Abstract This introduction provides a historical and analytical account of the Bangladesh Constitution enacted under the influence of comparative constitutionalism, and its development and changing landscape precipitated over the last 50 years of its journey from genesis. It identifies the challenges ahead and the way forward with a reformist pursuit. It concludes by articulating the relevance of the book for constitutional law studies and summarising its chapters.

Keywords Bangladesh · Constitution · Comparative constitutions · Judiciary · Transplantations · Challenges · Way forward · Roadmap · Reforms · Relevance of the book · Summary of chapters

1.1 The Constitutional Journey of Bangladesh

This edited book on the constitutional law and practice in Bangladesh comprehensively covers most constitutional aspects and their critical evaluation since their inception and implementation from 1972 to 2022. Its authorship includes authoritative constitutional law scholars from home and abroad who have ventilated their careful assessments, critical voices, and palatable recommendations to drive the constitutional rule of law going from strength to strength in the twenty-first century and beyond. The book was planned to commemorate the golden jubilee of the Bangladesh Constitution, marking the fiftieth anniversary of its adoption. Being an autochthonous document, the endurance of this Constitution has been remarkable.

M. R. Islam
Emeritus Professor of Law, Macquarie University, Sydney, NSW, Australia
e-mail: rafiqul.islam@mq.edu.au

M. E. Haque (✉)
Professor of Constitutional Law, Department of Law, University of Dhaka, Dhaka, Bangladesh
e-mail: ekram.haque@du.ac.bd

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*,
https://doi.org/10.1007/978-981-99-2579-7_1

It has survived a rollercoaster ride, kickstarted with democratic governance in the early 1970s, interrupted by autocratic military oligarchies camouflaged with seemingly democratic outfits in the 1970s and 1980s, and the resuscitation of parliamentary democracy in the 1990s and been continuing its sustained journey, of over half of a century, with resilience. Over the years, it has absorbed 17 amendments of both benign and malign effects on constitutional functioning. Bangladesh has witnessed both ‘abusive constitutionalism’¹ and ‘revision as an unmaking of a constitution’² in making constitutional changes and amendments.³ Nonetheless, its inherent pliancy has resulted in stable governance marked by record economic growth and prosperity.

The Constitution of Bangladesh has remained in force and suffered subservience during the martial law regimes and functioned amid all-powerful authoritarian executives. Despite its parliamentary democratic manifestations since 1991, the constitutional practice has diluted and departed from the traditional and common features of a parliamentary democracy enshrined in the original Constitution of 1972. These departures inclusively include: the ‘parliamentary opposition’ from the governing coalition, executive ministers from the opposition, prohibition on floor crossing in Parliament by any party-elected parliamentarians, confrontational politics, and questionable electoral process. A polarised feature with supporters and doubters is the co-existence of ‘secularism’ and ‘state religion’ in the Constitution and its impacts on communal harmony in Bangladesh.

The framers of the Constitution motivated by socialistic spirit have shown evidence of their great vision and integrity. The Constitution is not a stagnant piece of paper. It recognises the necessity of updating the constitutional provisions to keep pace with the changed circumstances and shared expectations of the present and future generations, displaying its pro-people legacy. Its operational imperatives shaping and reshaping for the last 50 years affords a functional constitutional experience that has brought about both stability in governance and sustainability in development. These and many more unique features and their orientations of the Bangladesh Constitution warrant a searching appraisal with a view to derive any lessons worthy of adoption and amelioration – the underlying purpose of this book. Every chapter in this book makes an evaluation of a specific aspect of constitutionalism in Bangladesh including looking back to the constituent assembly debates, intention of the constitution makers and how those dreams and aspirations have come into realities, what goals have been achieved, what caused some failures, and what should be its future directions considering comparative experiences of cross-border jurisdictions. At such a momentous point in history, it is imperative that its native and foreign constitutional authoritative voices assess the constitutional

¹David Landau, ‘Abusive Constitutionalism’ (2013) 47 UC Davis L Rev. 189, 195.

²Richard Albert, ‘Amendment and revision in the unmaking of constitutions’ in David Landau and Hanaa Lerner (eds), *Comparative Constitution Making*, (Edward Elgar 2019) 117–141.

³For example, the constitution 4th, 5th, 7th, 8th, and 15th Amendments.

design, understand the reasons for its successes and failures, and ventilate their scholarly views towards its progressive development to elevate it to a new height in the twenty-first century and beyond.

Commencing from independence, Bangladesh has come a long way in terms of its political stability and economic growth – a role model of development in the Third World. This book celebrates the fiftieth anniversary of the Constitution, portrays the journey of constitutionalism in Bangladesh comprehensively with intellectual observations, identifies and evaluates its progressive transformation, and palatable recommendations for improvement. The book is a ground-breaking pioneer work, which comprehensively accommodates separate discussion on nearly all parts and aspects of the Constitution covering its entirety and fills up a void in the existing literature. Individual chapters authored by outstanding constitutional law scholars with extensive experience in the Constitution of Bangladesh, whose intellectual contributions are invaluable to understand a major South Asian jurisdiction in the discipline of law and politics. As a very special feature of this project, the Chairman of the Drafting Committee of the Constitution himself has made his first ever attempt to write a book chapter on the history of its making revealing many unearthed information and materials to the readers. The intentions of the drafters and real-life experience of constitutional governance in Bangladesh has the potential of serving guidelines for the least developed countries desirous of achieving governance and development propelled by the constitutional rule of law.

The study of the evolution, progression, and transformation of the Constitution of Bangladesh is unique in many respects. Bangladesh achieved its independence from the Federation of Pakistan through a successful secessionist war in 1971. Its Unilateral Declaration of Independence (UDI) of 10 April 1971 was a revolutionary instrument that served as the ‘first constitution’ of Bangladesh.⁴ Its legitimacy emanated from the very success of the revolution – nothing succeeds like success.⁵ Its retrospective effect from 26 March 1971, the Independence Day of Bangladesh, was meant to avoid any constitutional vacuum and ensure the continuity and stability of the statehood of Bangladesh and validate all actions, rights, and duties of its provisional governmental authority then in-exile in India.

⁴Muhammad Ekramul Haque, ‘Formation of the Constitution and the legal system in Bangladesh: From 1971 to 1972: A critical legal analysis’ (2016) 27(1) *Dhaka University Law Journal* 41–56; Muhammad Ekramul Haque, ‘The Proclamation of Independence, 1971: Unilateral Declaration of Independence of Bangladesh’, *Encyclopedia of Public International Law in Asia* (Brill/Nijhoff, 2021) vol 3, 21.

⁵For legitimacy of a constitution see Richard H Fallon Jr., ‘Legitimacy and the Constitution’ (2005) 118 *Harvard Law Review* 1787, 1794–1801. For a discussion on founding moments, see Richard Albert and Menaka Guruswamy, ‘Introduction: Mapping the Founding’ in Richard Albert, Menaka Guruswamy and Nishchal Basnyat (eds), *Founding Moments in Constitutionalism* (Hart Publishing 2019) 1–5.

1.2 Borrowing from Comparative Constitutional Law by the Constituent Assembly

The Bangladesh Constitution was relatively a newcomer on the global constitutional law forum. By the time, ‘we the people’⁶ adopted in this Constitution, such pro-people oriented constitutional laws had already developed in different jurisdictions, notably in the UK, USA, France, Germany, Russia, and India. Thus, it was inevitable for the Constituent Assembly of Bangladesh (CA) to borrow different constitutional law ideas and provisions from the ‘global reservoir of constitutionalism’.⁷ Although comparative constitutional law has been ‘newly energized’ in the twenty-first century,⁸ the worldwide practice of the use of comparative constitutional law by new countries to formulate an optimal constitutional design started in the nineteenth century in Latin American and European countries.⁹ The Bangladesh Constitution was adopted during an era of extensive use of comparative constitutional law by different countries while new constitutions were being adopted during the post-cold war period.¹⁰ It was heavily influenced by comparative constitutional law materials while it was formulated and adopted in the early 1970s of the twentieth century. The CA discussed and referred to the constitutional laws of different countries to develop or justify its own ‘optimal design’ – a process can be compared with ‘Aristotle’s *politics*’.¹¹ Thus, the Bangladesh Constitution emerged as an autochthonous constitution designed¹² by its own people, which derived its validity and authority from home-grown politico-legal exigencies and set its own voice in its own style.¹³

The CA preferred the parliamentary form of government over the presidential form of government and used Pakistan’s constitution of 1962 and the US constitution as *contrario* (contrary),¹⁴ arguing that the presidential form of government

⁶ Bangladesh Constitution 1972, preamble.

⁷ Günter Frankenberg, ‘Comparative constitutional law’ in Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 171, 186; Tom Ginsburg, ‘Introduction’ in Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press 2012) 2.

⁸ Tom Ginsburg and Rosalin Dixon, ‘Introduction’ in Tom Ginsburg and Rosalin Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 1.

⁹ *ibid.*

¹⁰ *ibid.* 3.

¹¹ For a discussion on adopting an optimal design based on comparative constitutional law, see *ibid.* 1.

¹² For a discussion on constitutional design, see Günter Frankenberg, *Comparative Constitutional Studies: Between magic and Deceit* (Edward Elgar 2018) 27–62.

¹³ Kevin YL Tan and Ridwanul Hoque, *Constitutional Foundings in South Asia* (Hart Publishing 2021) 115. For a detailed study on autochthonous constitution, see Peter C Oliver, ‘Autochthonous Constitutions’, *Max Planck Encyclopedia of Comparative Constitutional Law* (2016) <<https://oxcon.oupplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e12?>> accessed 12 August 2022.

¹⁴ Tania Groppi and Marie-Claire Ponthoreau, ‘Introduction’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013) 9.

carries a high risk of dictatorship.¹⁵ Regarding inclusion of writ as a constitutional remedy, the Chair of the Constitution Drafting Committee categorically said that the constitution did not mention the Latin terms habeas corpus, mandamus, prohibition, certiorari, and quo warranto explicitly in order to avoid technicalities connected to those phrases and as such to widen the periphery and nature of the remedy. In tandem with the reasoning substantiating it, article 102 successfully incorporated all 5 writs referred to, without explicit mention, so as to be able to explore and implement a wider sense due to the absence of those exact Latin terms.¹⁶ The CA extensively debated on the constitutional model of protection of Civil and Political rights (CP rights) and Economic, Social, and Cultural rights (ESC rights). The negative model of the constitutional protection of CP rights in that the state shall not take away those rights, was accepted by the CA along with the positive approach that the people would be guaranteed to have those rights. To justify the idea of making CP rights subject to restrictions, the framers of the Constitution relied on constitutional laws and practices of many countries including the US, UK, France, Burma, Eire, West Germany, and Japan.¹⁷ Although two members attempted to use the reference to the constitution of Pakistan as *contrario* to argue to protect CP rights as absolute fundamental rights without any restriction, this was rejected by the majority.¹⁸

After a long discussion made on constitutional model of protection for ESC rights, the CA finally recognised ESC rights as judicially unenforceable fundamental principles of state policy in line with the Irish and Indian constitutions.¹⁹ The minority proposal to omit the provision on judicial unenforceability on the ground of its alleged similarity with the constitution of Pakistan was rejected.²⁰

¹⁵ Bangladesh, *Constituent Assembly Debates (Gono Parishader Bitarka, Sarkari Biboroni)* vol 2, 119–20 [per Syed Nazrul Islam].

¹⁶ *ibid.* 431–432 [per Dr. Kamal Hossain].

¹⁷ *ibid.* 270, 273, 274, 275, 502, 503, 520.

¹⁸ *ibid.* 503, 514, 515 [per Manabendra Narayan Larma and Suranjit Sen Gupta]. Generally speaking, the global model of constitutional rights allows restrictions on the rights. For details see Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 1.

¹⁹ The Constitution-Bill was raised in the Constituent Assembly for consideration on 19 October 1972 and the general discussion on the Bill continued till 30 October 1972. See for details, Bangladesh (n 15) 102 and 445. This discussion has been compiled in the Constituent Assembly Debates (*ibid.* 102–442), which included, inter alia, the discussion on the issue of the fundamental principles of state policy (*ibid.* 122–23, 147–50, 154, 156–57, 161, 185, 196–97, 221–26, 236, 250, 259–62, 264–70, 280–83, 291, 293, 305, 309, 322–23, 325, 325–27, 333–34, 349, 353, 355, 357–58, 370, 372, 377–78, 384, 386–87, 391, 397, 399, 406, 408, 409–10, 413–14, 421, 435, 437, 439, 441–42; see Muhammad Ekramul Haque, ‘Constitutional Protection of Economic and Social Human Rights: Intention of the Constitution-Makers and Judicial Interpretations’ in Ridwanul Hoque and Rokeya Chowdhury (eds), *A History of the Constitution of Bangladesh: The Founding, Development, and Way Ahead* (Routledge 2022) (forthcoming); For a brief discussion on current judicial trend regarding enforcement of the fundamental principles of state policy see Muhammad Ekramul Haque, ‘Justiciability of Economic, Social and Cultural Rights under International Human Rights Law’ (2021) 32(1) *Dhaka University Law Journal* 39–54 <<https://doi.org/10.3329/dulj.v32i1.57179>> accessed 16 November 2022.

²⁰ Bangladesh (n 15) 222; See Muhammad Ekramul Haque (n 19).

In justifying the constitutional inclusion of both socialism and private ownership simultaneously, apart from referring to the constitutions of China, Germany, Russia, the UK, India, Poland, and Japan,²¹ it was claimed by the CA that Bangladesh did not accept people's capitalism of the US, welfare state of the UK, or Chinese and Russian socialist system under the authority of one party; rather it had the similarities with the constitution of Yugoslavia which recognised both socialism and the concept of private ownership concurrently.²² The CA expressed its pride by the fact that the Constitution did not incorporate the provisions on emergency and preventive detention unlike the constitution of Pakistan,²³ although both were incorporated in the Constitution within a year of its adoption and enforcement through a constitutional amendment.²⁴

The Bangladesh Constitution was modelled largely along the British parliamentary system of government and the American-style separation of powers with appropriate checks and balances to ensure the constitutionally delineated boundaries of the three co-equal organs of the government, namely the executive, legislature, and judiciary. This blended Constitution introduced the parliamentary system but departed from being fully the Westminster system. Unlike the Westminster, the Bangladesh Constitution was enacted through a formal process in written-form and made the legislature a non-sovereign lawmaking body subject to the constitutionality and judicial review of legislative acts under article 8(2). The constitutionally entrenched separation of powers with checks and balances and judicial review as the functional *modus operandi* of the government are usually found in the constitution of a presidential form of government, which the original Constitution departed from. The drafters decided to follow the international model of human rights protection, which was a circuit breaker for the citizens. The transplantation of many western-style democratic rights and instruments has been an integral part of the Constitution. The concept of a 'rule of law' modeled government backed by constitutional supremacy has been installed in the constitutional framework of Bangladesh.

1.3 Influence of Comparative Constitutional Law: Constitutional Transplants by the Judiciary

Constitutional borrowing and transplants through judicial interpretation has been a globally common practice.²⁵ In Bangladesh, the judiciary has made several landmark constitutional law developments through constitutional borrowing and

²¹ Bangladesh (n 15) 123, 153, 281, 282, 331, 333, 422, 437.

²² *ibid.* 463 [per Subed Ali], 123 [per Syed Nazrul Islam].

²³ *ibid.* 192, 507.

²⁴ The Constitution (Second Amendment) Act 1973 of 22 September 1973, ss 3 and 6.

²⁵ Cheryl Saunders, 'Judicial Engagements' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar 2014) 80–101; Rosalind Dixon and David Landan, *Abusive Constitutional Borrowing* (OUP 2021) 1; David Landau, 'Judicial role and the limits of constitutional convergence in Latin America' in Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Latin America* (Edward Elgar 2017) 227–52; Ran Hirschl,

transplants. For example, the idea of liberalising the locus standi for getting a constitutional remedy was first introduced in *Kazi Mukhlesur Rahman*²⁶ case in Bangladesh in 1974. In this case, the court liberally interpreted the meaning of the term ‘aggrieved person’ in article 102 of the Constitution. This liberal judicial interpretation reflected the then British judicial development on liberalisation of the rigid construction of an aggrieved person to grant locus standi to a person. As a continuation of this process, the issue of locus standi was finally liberalised in *Mohiuddin* case (locus standi case)²⁷ which eventually opened the door of public interest litigation in Bangladesh. *Mohiuddin* case was deeply influenced by British, American, and Indian constitutional law developments on locus standi.

In an earlier *Mohiuddin* case (contaminated milk case),²⁸ on 1 July 1996, the court expressly transplanted the concept of extended meaning of the right to life. In adopting this transplantation, the court said that ‘[i]n the absence of any such interpretation from our domain, we may see what meaning was given by the superior courts of other countries to the right to life’.²⁹ The court then transplanted an extended meaning of the right to life in Bangladesh with reference to a set of foreign judgments. The court in *Tayeeb* case³⁰ transplanted the idea of suo moto jurisdiction from the Indian constitutional law jurisprudence. *BNWLA* was a case of transplantation of the *Visakha*³¹ model of judicial law making by the Indian Supreme Court, where the court formulated a set of directives in the nature of law in order to fill in the legislative vacuum for the protection of women against sexual harassment.³² The court in *Bilkis* case³³ transplanted the Indian model of public law compensation as a constitutional law remedy with reference to a set of Indian cases on this point including *Rudul Shah*³⁴ and *Nilabati Behra*.³⁵

The court, in several cases, adopted the functional test to determine the nature of the authority against whom a writ will lie and thus eventually has transplanted the *Datafin* Test adopted by the British court in *R v Pnael Takeover*.³⁶ This case established the principle that a writ would lie not against a public or statutory body but against any authority performing function in the nature of a public authority in a public domain. This eventually created the scope for horizontal enforcement of

‘Judicial review and the politics of comparative citations: theory, evidence and methodological challenges’ in Erin F. Delaney and Rosalind Dixon (eds.), *Comparative Judicial Review* (Edward Elgar 2018) 403–22.

²⁶ *Kazi Mukhlesur Rahman v Bangladesh and Another* (1974) 26 DLR (AD) 44.

²⁷ *Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD) 1.

²⁸ *Mohiuddin Farooque v Bangladesh* (1996) 48 DLR 438.

²⁹ *ibid.*

³⁰ *Tayeeb and others v Bangladesh* (2015) 67 DLR (AD) 57.

³¹ *Visakha v State of Rajasthan* AIR 1997 SC 3011.

³² *BNWLA v Bangladesh* (2009) 29 BLD 415.

³³ *Bilkis Akhtar Hossain v Bangladesh* (1997) 17 BLD 395.

³⁴ *Ruhul Shah v State of Bihar and another* AIR 1983 SC 1086.

³⁵ *Nilabati Behara v State of Orissa* AIR 1993 SC 1960.

³⁶ *R v Panel on Take-overs and Mergers* (1987) QB 815.

constitutional law in Bangladesh. In 1989, the judiciary transplanted³⁷ the idea of basic structure of the Constitution in the constitution 8th Amendment case,³⁸ which is ‘deeply problematic’³⁹ and one of the most controversial constitutional law provisions in the modern world. Subsequently Parliament expressly incorporated provisions on the basic structure of the Constitution through the 15th amendment in 2011.⁴⁰ A major portion of the Constitution now constitutes its basic structure, which has now been an issue of interest for the comparative constitutional lawyers around the world.⁴¹ The very idea of eternal provision in a constitution is controversial,⁴² and in case of Bangladesh the situation is more difficult⁴³ because of a wholesale list of basic structure which included more than one third of the entire constitution.⁴⁴

Apart from constitutional transplantation, the Supreme Court of Bangladesh has made, in exercise of ‘strong form judicial review’,⁴⁵ a significant number of ‘informal’⁴⁶ constitutional developments through judicial interpretations, which

³⁷Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) 47; also, Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 112–19; Ridwanul Hoque, ‘The Judicialization of Politics in Bangladesh’ in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism—Law and Politics in South Asia* (Cambridge University Press 2015) 261, 278–85.

³⁸Ridwanul Hoque, ‘Constitutionalism and the Judiciary in Bangladesh’ in Sunil Khilnani et al. (eds.), *Comparative Constitutionalism in South Asia* (OUP 2014) 303, 316; Roznai (n 37) 48; Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 138.

³⁹Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 194.

⁴⁰Suteu (n 38) 126.

⁴¹ibid. 138–39.

⁴²Richard Albert and Bertil Emrah Oder, ‘The Forms of Unamendability’ in Richard Albert and Bertil Emrah Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2019) 1; Suteu (n 38) 126; Mark Tushnet, ‘Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power’ (2015) 13(3) *International Journal of Constitutional Law* 639.

⁴³Mark Tushnet has argued that the implementation of basic structure doctrine ‘may be quite difficult’, for details, Mark Tushnet, ‘Amendment theory and constituent power’ in Gary Jacobsohn and Miguel Schor (eds.), *Comparative Constitutional Theory* (Edward Elgar 2018) 317, 331. For details on eternal clauses in the Constitution of Bangladesh, see Ridwanul Hoque, ‘Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All?’ in Richard Albert and Bertil Emrah Oder (n 42) 195–229.

⁴⁴For the discussion on more complexities see Suteu (n 38) 248; Po Jen Yap and Rehan Abeyratne, ‘Judicial self-dealing and unconstitutional constitutional amendments in South Asia’ (2021) 19(1) *International Journal of Constitutional Law* 127–48.

⁴⁵Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008).

⁴⁶Richard Albert, ‘Introduction: The State of the Art in Constitutional Amendment’ in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart 2017) 1–2.

seemingly has turned the Court into a ‘positive legislator.’⁴⁷ These judicial interpretations include the declaration of unconstitutionality of constitutional amendments,⁴⁸ introducing public interest litigation,⁴⁹ proactive role to protect women’s rights,⁵⁰ substitution of subjective satisfaction by objective satisfaction in preventive detention cases,⁵¹ protection of environment, river and natural resources through the use of doctrine of public trust.⁵² Again, the Supreme Court has extensively used international law in interpreting and developing constitutional human rights in Bangladesh. The instances of judicial application of a treaty obligation without Bangladesh becoming a party to that treaty have led jurists to assume the existence of a creeping monism tendency in the practice of Supreme Court in interpreting constitutional rights and obligations.⁵³

The Supreme Court has become the guardian of the Constitution harnessing its power of judicial review to ensure the Constitution as the supreme law of the Republic. It has typically been a strong institution. Its vanguard role in defending rights of the citizens and judicial activism has expanded the horizon of rights of the citizens as a part of the social contract in the Constitution. Its judicial review power has allowed the Court to develop the constitutional jurisprudence often by borrowing ideas, doctrines, and concepts from foreign jurisdictions. The idea of expanding the scope of locus standi, doctrine of political question, doctrine of legitimate expectation, and the Wednesbury principle of unreasonableness – all have found their way to the Bangladesh corpus juris. However, the challenges that the Supreme Court has faced are daunting, which has occasionally notioned that its practice of judicial review is more akin to judicial activism, which threatened its independence as a major pillar of the Constitution. In addition, the Constitution also incorporates the ideological aspirations of the state and court-policed liberties.

⁴⁷ For an analysis of the term ‘positive legislator’, see Allan R. Brewer-Carías, *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press 2011) 5–192; for Bangladeshi context, see Md Rizwanul Islam, ‘Judges as legislators: benevolent exercise of powers by the higher judiciary in Bangladesh with not so benevolent consequences’ (2016) 16 *Oxford University Commonwealth Law Journal* 219–34.

⁴⁸ For a discussion on the sixteenth amendment case see, Po Jen Yap and Abeyratne (n 43).

⁴⁹ Naim Ahmed, ‘Litigating in the name of the people: Stresses and strains of the development of public interest litigation in Bangladesh’ (PhD Thesis, SOAS, London 1998); Sara Hossain et al. (eds), *Public Interest Litigation in South Asia: Rights in Search of Remedies* (University Press Ltd., Dhaka 1997).

⁵⁰ On access to justice issues for women, see Atia Naznin, ‘Women’s Right to Access to Justice: The Role of Public Interest Litigation in Bangladesh’ (2021) 21(2) *Australian Journal of Asian Law* 99–117.

⁵¹ M Ehteshamul Bari, ‘Preventive detention laws in Bangladesh and their increased use during emergencies: a proposal for reform’ (2017) 17 *Oxford University Commonwealth Law Journal* 45–74.

⁵² Azhar U Bhuiyan, ‘The Doctrine of Public Trust: Its Judicial Invocation in Bangladesh and the Future Potentials’ (2021) 9(1) *Jahangirnagar University Journal of Law* 99–118.

⁵³ Muhammad Ekramul Haque, ‘Use of International Law in Interpreting Constitutional Rights in Bangladesh’, *Encyclopedia of Public International Law in Asia* (Brill/Nijhoff, 2021) vol 3, 31.

1.4 National, Regional, and International Relevance of the Book

The book chapters critically analyse not only the text of the Constitution and some judicial precedents but involve in a much larger task of unveiling the interpretative approach of the Constitution from a comparative constitutional law perspective. They project the future roadmap for the journey of constitutionalism in Bangladesh, offering policy recommendations for the revision of the Constitution. Such extensive range of research is likely to be handy and appropriate for academics, researchers, libraries, lawyers, judges, lawmakers, human rights specialists and activists, constitutional strategists and policymakers, and governments in Bangladesh and the global community of constitution thinkers and comparative constitutional lawyers.

Upon analysis of recent research on constitutional law, an emphasis on global or regional perspectives of constitutional law can be observed. This is furthermore evident from the fact that there is a growing number of research on South Asian constitutionalism, Asian constitutional law, and global constitutional law. This book lends a hand to researchers of constitutional law worldwide regarding the evolution and development of the constitutional law of Bangladesh over 50 years from its embryonic stage with reference to comparative constitutional law, a very useful resource for comparative constitutional researchers in the sense that they will be able to easily interpret the constitutional law of Bangladesh from national, regional, and global constitutional law perspectives.

South Asian constitutionalism has never elicited more academic spotlight than it gets nowadays. One primary reason behind such interest is the turn towards global constitutionalism. Till the last decade, major constitutional studies around the world predominantly focused on European and American constitutions and scholarships thereof. Attention towards global constitutionalism has also underscored the need for the wide appreciation of and deeper interest in constitutionalism in the global south countries to meet the urgent need for North-South constitutional conversation.⁵⁴ Focus on constitutionalism in Asian jurisdictions started gaining momentum in the last decade, revealing an increased interest in South Asia as a region of importance.⁵⁵

The existing literature on global south constitutionalism and south Asian constitutionalism dominantly focuses on the Indian constitutional system. However, the 50th anniversary of the Constitution of Bangladesh is a departure moment for

⁵⁴ Cambridge University Press Journal titled “Global Constitutionalism” has been pursuing the pathways of global constitutionalism, while Daniel Bonilla Maldonado (ed), *Constitutionalism of the Global South* (Cambridge University Press, 2013) and Philipp Dann et al. (eds), *The Global South and Comparative Constitutional Law* (OUP 2020) campaigns for constitutionalism in southern countries.

⁵⁵ Khilnani et al. (n 38) and Kevin YL Tan and Ngoc Son Bui (eds), *Constitutional Foundations in South Asia* (Hart Publishing 2019); law journals published by Cambridge University Press, namely *Asian Journal of International Law*, *Asian Journal of Comparative Law*, and *Asian Journal of Law and Society* delineate the renewed interest in the Asian region.

constitutionalism in Bangladesh. From a bottomless basket case as famously labelled by Henry Kissinger, Bangladesh has come a long way to be a global role model for development as considered by eminent economist and Nobel laureate Amartya Sen. Such progress of Bangladesh has not been a smooth journey as it had its fair share of ups and downs in terms of its constitutional growth, resilience, and responses to different constitutional challenges. This book attempts to provide the readers enthusiastic about south Asia with an authentic commentary on the constitutionalism in Bangladesh. It revisits Bangladesh's last 50 years of constitutional journey through the lens of comparative constitutional law and roadmap avenues for its future development. This book will be a rich resource for anyone interested in the interaction between the local unique particulars, global south constitutionalism, and comparative constitutionalism in south Asia and beyond.

1.5 The Way Forward: Challenges and Roadmap of Reforms for Future Constitutionalism

The constitutional journey of Bangladesh over the past 50 years has been both exhilarating and turbulent. The continuing stability of the government and achievements of economic prosperity and development has not been without cost to its constitutionalism and constitutional guarantees. As highlighted and commented upon in various chapters of the book, there are certain governing practices and excesses of both civil and military governments that have militated against democratic governance designed in the original Constitution of 1972. They in effect blur the stark contrast between parliamentary democracy and parliamentary autocracy, dissipate governing accountability, and contradict the constitutional pillars of state policies. The Republic, government, and political party in power function indistinguishably as if they are one entity, evolving a power structure that prioritises political leaders over and above political institutions, and results in the personalisation of public power, paralysing the constitutional role of political institution-building. Constitutional transformation through amendments often camouflages partisan interest to stay in power, which brings back constitutional progression once again at the starting point. This is how the Constitution has been eclipsing under the shadow of a pretentious democratic governance for the last 50 years. Should these practices continue unabated for want of their meaningful reforms, the future constitutional journey is likely to drift from the cherished goal of democratic governance to authoritarianism.

The constitutional practices and excesses that warrant a searching reappraisal with a view to their reforms are manifold. Ushering a reform pursuit on some examples of practices and excesses provided below is in order and indeed imperative for Bangladesh to charter its constitutional journey beyond 50 years. The implementation of the two main features of the hybrid Constitution of Bangladesh, namely the parliamentary form of government and separation of power with

checks and balances between the three principal organs of the government, over the last 50 years has been a perplexing and daunting experience. The British Westminster parliamentary system requires parliament to be powerful enough to oversee the executive and judiciary to make them exercise their powers within the constitutional bounds and accountable to the people, which is non-existent in Bangladesh. Several historical factors and parliamentary practices have compromised it from a Westminster-type institution of democratic accountability.⁵⁶ Attributable causes in the main include:

- internal structure of Parliament and its relationship with the people, undemocratic political parties and unqualified majoritarianism suppressing parliamentary oppositions⁵⁷;
- dysfunctional parliamentary committee system dominated by the ruling party MPs;
- lackluster ministerial responsibility – both individual and collective;
- appointment of ministers from domesticated parliamentary opposition;
- unlimited power of the Prime Minister/President over Parliament and their political parties;
- rise of personality cult and dynastic patrimonial authoritarian grip on the political party⁵⁸;
- prohibition on floor-crossing leading MPs to represent their political parties instead of their constituencies;
- party leaders' personalised selection and nomination of parliamentary candidates forcing MPs to remain loyal to the leaders instead of their constituent people⁵⁹; and
- electoral legitimacy crisis due to the questionable functioning of the Election Commission in holding free and fair elections.

The collective and cumulative effects of these factors and practices over the past 50 years have significantly compromised the stature of the Bangladesh Parliament as a legislature of a parliamentary form of government, let alone the British Westminster-modelled parliament. The Bangladesh Parliament has been branded as

⁵⁶M Steven Fish, 'Stronger Legislature, Stronger Democracies' (2006) 17(1) *Journal of Democracy* 5–20.

⁵⁷Tahmina Rahman, 'Party System Institutionalization and Pernicious Polarization in Bangladesh', (2019) 681(1) *ANNALS of the American Academy of Political and Social Science* 173–92; Rounaq Jahan and Amundsen, *The Parliament of Bangladesh: Representation and Accountability* (Centre for Policy Dialogue and Chr. Michelsen Institute, Dhaka and Bergen, 2012).

⁵⁸Shafi Md Mostofa and DB Subedi, 'Rise of Competitive Authoritarianism in Bangladesh' (2021) 14(3) *Politics and Religion* 431–59; Inge Amundsen, 'Democratic Dynasties? Internal Party Democracy in Bangladesh' (2016) 22(1) *Party Politics* 49–58; Nizam Ahmed, 'From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973–2001)' (2003) 76(1) *Pacific Affairs* 68–69.

⁵⁹Rounaq Jahan, 'The Parliament of Bangladesh: Representation and Accountability', (2015) 21(2) *Journal of Legislative Studies* 250–69.

more like an ‘Eastminster’,⁶⁰ institution, incapable of ensuring democratic and legislative accountability. The Executive control over, and unwillingness to relinquish its influence on, the Judiciary has consistently denied judicial independence from the Executive as explicitly embodied in the Constitution. It is this de facto political leverage, public unaccountability, and legal exoneration of vast empire of executive domain of powers encompassing Parliament and the Judiciary have hamstrung the normal functioning of the constitutional separation of power with appropriate checks and balances between the three main government organs. The two structural pillars of the Constitution, the parliamentary democracy and separation of power with checks and balances between the three principal organs, are yet to fully materialise.⁶¹

It is not the mixed features of parliamentary government and separation of powers in the Constitution, but their twisted interpretations and perfidious applications, that render their modus operandi dysfunctional. The way forward for the restoration of the cherished parliamentary form of government propelled by the separation of powers with checks and balances warrants a searching reappraisal of the above factors and practices with a view to embark on a major reform pursuit to advance the constitutional rule of law in Bangladesh. For any such reformist agenda to succeed, it is necessary to change the ongoing practice of legislative policy-making authority to be transferred from the Executive to Parliament. Past constitutional amendments reveal that the unlimited power of the Prime Minister/President over Parliament and political parties in power led Parliament to enact amendments to serve the political interest of political parties in power to consolidate their power, not necessarily to advance the constitutional rule of law. In several cases, the Executive and Parliament jointly enacted these amendments in violation of the Constitution.⁶² Similar sectarian

⁶⁰ Kumarasingham, Harashan, ‘Eastminster – Decolonisation and State-building in British Asia’ in Harshan Kumarasingham (ed), *Constitution- making in Asia, Decolonisation and State-building in the aftermath of the British Empire* (Routledge 2016) 1; M Jashim Ali Chowdhury, ‘The “Westminster” Parliament of Bangladesh: A Critical Evaluation’ (PhD thesis at King’s College London 2022) 206–22.

⁶¹ Nizam Ahmed, *Parliaments in South Asia: India, Pakistan and Bangladesh* (Routledge 2020) 128–29; Steinar Askvik and Ishtiaq Jamil, ‘The Institutional Trust Paradox in Bangladesh’ (2013) 13(4) *Public Organization Review* 466–70; Muhammad A Hakim, ‘Bangladesh: The Beginning of the end of Militarised Politics?’ (1998) 7(3) *Contemporary South Asia* 283–300; Siegfried O Wolf, ‘Civil-Military Relations and Democracy in Bangladesh’ (2013) *Spotlight South Asia* (special Issue) 14–30; Aurel Croissant et al., *Democratization and Civilian Control in Asia* (Palgrave Macmillan, London 2013) 118–35.

⁶² The HCD declared the 5th amendment validating the martial law regimes during 1975–1978 ‘illegal and unconstitutional’ in *Bangladesh Italian Marble Works Ltd v Government of Bangladesh* (2006 Supl) BLT (HCD) 1 (writ petition No. 6016 of 2000, decision of 29 August 2005), which was upheld by the AD on 1 February 2010 in Civil Petition for Leave to Appeal Nos. 1044 and 1045 of 2009 in *Khondhker Delwar Hossain v Bangladesh Italian Marble Works Ltd and Others* (2010) 62 DLR (AD) 298; the 7th amendment validating the second martial law regime in the 1980s was declared ‘illegal and unconstitutional’ by the HCD in *Siddique Ahmed v Bangladesh* (2011) 33 BLD (HCD) 84; the 8th amendment decentralising the Judiciary was declared unconstitutional for being inconsistent with the basic structure of the Constitution by the AD in *Anwar*

interest serving reforms and/or cosmetic changes in the status quo are set to be inadequate to bring about the meaningful reforms required for the progression of the constitutional rule of law to ensure the dignified existence of Bangladesh in the twenty-first century.

The success of a constitution depends on many factors.⁶³ However, legal and political culture of a country are very important for getting benefits of a constitution.⁶⁴ The Constituent Assembly of Bangladesh in 1972 rightly referred to the statement of American Chief Justice Marshall who said that '[c]onstitution is a skeleton. It is the political parties which provide flesh and blood in it'.⁶⁵ If a constitution does not function in the right way, it will be nothing but an 'illusion of legitimacy' to a regime.⁶⁶ As such, reforming the Constitution of Bangladesh is likely to be hollow and self-defeating for want of reforms in the political culture, practice, and orientation of political parties, which remains the daunting challenge for Bangladesh.

1.6 Compiling and Summarising Chapter Abstracts

Part I of the book examines the constitution-making process, changes, and philosophies of the Constitution. In Chap. 2 of this part is devoted to the making of the Constitution of Bangladesh. Dr. Kamal Hossain, the Chair of the Constitution drafting committee, articulates the context in, and process by, which the Constitution was framed and how challenges pertaining to making a constitution in a newly independent country were overcome. It highlights philosophical hindsight in making the constitution, intentions of the constitution makers, spirit of the constitution, how constitutions of different countries, international law, and the history of struggle of the Bangladeshi people had an influence on drafting the constitution. It also

Hossain Chowdhury v Bangladesh (1989) BLD (AD) (special) 1; the 13th amendment introducing the non-political caretaker government was declared unconstitutional by the AD in *Abdul Mannan Khan v Bangladesh* (2012) 64 DLR (AD) 1; and the 16th amendment on the power of Parliament to remove superior court judges for proven incapacity or misconduct was declared unconstitutional by the HCD in *Assaduzzaman Siddiqui and others v Bangladesh* (writ Petition No. 9989 of 2014, decision of 5 May 2016) and upheld by the AD in Civil Appeal No. 6 of 2017 and decision of 3 July 2017, which is currently under review by the AD, *Dhaka Tribune* (24 December 2017) <<https://archive.dhakatribune.com/bangladesh/court/2017/12/24/review-petition-filed-16th-amendment-verdict>> accessed 21 June 2022. For a list of 'unconstitutional amendments', see *The Daily Star* (Dhaka, 21 June 2021, Law & Our Rights) <<https://www.thedailystar.net/law-our-rights/unconstitutional-amendments-1487263>> accessed 21 June 2022.

⁶³ Tom Ginsburg and Aziz Z. Huq, 'Assessing constitutional performance' in Tom Ginsburg and Aziz Z. Huq (eds), *Assessing constitutional performance* (Cambridge University Press 2016) 3–38.

⁶⁴ Martin Shapiro, 'Parties and constitutional performance' in Tom Ginsburg and Aziz Z. Huq (eds), *Assessing constitutional performance* (Cambridge University Press 2016) 134–144.

⁶⁵ Bangladesh (n 15) 129 [per Syed Nazrul Islam].

⁶⁶ Tom Ginsburg and Alberto Simpser, 'Introduction: Constitutions in Authoritarian Regimes' in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) 1.

portrays the actual dreams of the committee and framers and the impact of the constitution on Bangladesh and concludes by portraying how these dreams resonate in the twenty-first century Bangladesh.

The **third chapter** concentrates on the Constituent Assembly debates on framing the Constitution. It examines the lively, meaningful, and in-depth debates in the Constituent Assembly in 1972 on the objectives, principles, contents, and institutions of the Constitution, including its design, enforceability of fundamental principles of state policy, desirability of imposing restrictions on fundamental rights, independence of the judiciary, parliamentary sovereignty, and executive accountability. It underscores the special importance of these debates as important guidelines for appreciating the intentions, insights, and apprehensions of the framers of the Constitution, in the interpretation of constitutional provisions, in adopting measures for strengthening the constitutional architecture and for working out the contemporary constitutional discourse. Drawing upon constitutional developments and deviations so far, the author identifies the areas on which future constitutional discourse should evolve and contribute to strengthening the constitutional and democratic institutions in Bangladesh.

In critically examining the co-existence of secularism and the state religion in the Constitution and its effects on minority rights and communal harmony in multi-religious Bangladesh, Chap. 4 argues the pivotal role that secularism played in the independence war in 1971. Secularism in the East Pakistan developed as a challenge to the abuse of religion and politicisation by the ruling elites of Pakistan and it was conceived by Bangabandhu as inclusive of all practices of religious faiths. The martial law regimes in Bangladesh during 1975–90 replaced secularism by ‘Islam’ as the state religion. The parliamentary democratic government since 1991 reinstated secularism without removing the state religion, which has compromised the secular character of the Constitution and exposed minority rights to be manipulated for political ends. Based on some incidents, the chapter suggests that the prospect of harmonious co-existence of secularism and the state religion appears bleak and intensified religious intolerance, hatred, and communal violence ample in Bangladesh.

The **fifth chapter** highlights and comments upon how the principles of customary international law have become an important consideration in national constitutional ideation, conceptualization, and rulemaking in general and in the Constitutional Law of Bangladesh in particular. It articulates the extent to which customary international law principles and norms have shaped the protection of citizens’ rights, fulfilment of international obligations, and constitution-building process in Bangladesh. Chapter 6 on constitutional development through amendments examines the process of constitutional changes and finds the lack of adequate public participation and deliberation creating a democratic legitimacy crisis. It addresses this inadequacy by suggesting reforms to the constitution changing process and holding referendum on any specific issue warranting amendment to maximise the democratic features of the Constitution and minimise amendment abuses and unconstitutional access to power.

Part II evaluates the functionality of the state and constitutional organs of Bangladesh. In promoting the democratic accountability of Parliament, Chap. 7 sets the agenda for strengthening the parliamentary system in Bangladesh. It traces the evolution of the Bangladesh Parliament over the last 50 years. Apart from its law-making task, parliament is also entrusted to ensure accountability of the government through the supervisory role of its committees, which are largely dysfunctional in Bangladesh. The author critically explains various reasons for developing both vertical and horizontal parliamentary accountability mechanisms, including the potential challenges thereof in Bangladesh.

Chapter 8 explains the nexus between good governance and human rights principles to constitute the core of the constitutional order of modern States, which establishes interactions between citizens and the State and oversight processes that hold public officials accountable for unconstitutional acts or omissions. This chapter looks at how the Constitution of Bangladesh balances fundamental rights and fundamental principles of state policy to ensure good governance, preserve the rule of law, and pave the way for a just, free, democratic social order, and challenges that have over the years shaped the culture of governance and human rights in Bangladesh. Chapter 9 on judicial accountability seeks to ensure that all judicial decisions are made impartially and with efficiency and integrity. There is no specific and transparent procedure for making complaints against a transgressing judge, making difficult for the public to file a complaint against a judge for incapacity, misconduct, or corruption. For the sake of ensuring justice and maintaining high standards of judicial conduct, it argues for an accessible system to make complaints against judges. It underscores the need for an exclusive mechanism for judicial accountability and suggests reform for the existing but inadequate mechanisms.

The plight of electioneering in Bangladesh and how its constitutionally prescribed ways and means of holding free and fair elections have been frustrated over the past 50 years are the subject-matters of Chap. 10. It identifies the major problems of holding credible elections. The formal institutional design of electioneering is weakened by the deinstitutionalising tendencies of its clientelist and autocratic party system and lack of institutional imagination on the part of the framers and subsequent reformers of the Constitution. Their imagination of an 'independent' Election Commission was not visionary enough to articulate the constitutive and administrative autonomy of the Commission, which is prone to easy co-optation by the executive branch. The institutional imaginations of subsequent political reformers were convenience driven and lacked serious consideration of the Constitution's structural balances and foundational principles. Consequently, elections in Bangladesh often suffer from credibility crisis amid an illiberal political system.

Part 3 deals with specialised constitutional rights and issues. Its Chap. 11 identifies restrictions within the constitutional fundamental rights in Bangladesh. The design of the Bangladesh Constitution provides that some fundamental rights are absolute while others are qualified. Such an architecture of the autochthonous

Constitution leaves discretion for the court to interpret and develop contents of fundamental rights jurisprudence, and policy space for the executive and legislature to govern the country. In interpreting these constitutional texts, the Supreme Court of Bangladesh has unanimously run the ‘Wednesbury unreasonableness test’ and declined to transplant the non-identical ‘proportionality test’. This chapter enquires into the application of the ‘Wednesbury unreasonableness’ test and in-application of the ‘proportionality test’ by the Supreme Court. By showing the difference between the utility of these two tests, the chapter argues that the ‘proportionality test’ provides a more transparent and clearer framework to review executive and legislative actions involving fundamental rights of the citizens. It also investigates the political history of Bangladesh that contributed to the judicial reticence in accepting the ‘doctrine of proportionality’ and the fear that any higher test than the Wednesbury test would transgress the jurisdiction of the executives and legislature. Finally, the chapter concludes that regardless of history, the PT should be applied in assessing reasonableness of restrictions on certain types of fundamental rights.

Chapter 12 explores the constitutional trend, development, and challenges relating to the realisation of rights for women, children, and ‘backward sections’ of the people in Bangladesh. Its Constitution recognises different categories of rights under the fundamental principles of state policy and fundamental rights. The assertive enumeration of equality (both formal and substantive) and non-discrimination requires Bangladesh not to discriminate against any citizen on any grounds whatsoever. The Constitution also underscores the necessity of affording special protection to women, children, and ‘backward sections’ of the people. The term ‘backward sections’ of the people remains undefined and is left to the judicial construction by the Supreme Court. Consequently, the constitutional journey towards upholding and protecting the rights of women, children, and ‘backward sections’ of the people is intertwined with the intervention of the higher judiciary. Chapter 13 deals with the restrictions on constitutional guarantees on ground of international crimes exception. It delineates the scope of this exception from the viewpoints of constitutional and international law. It traces the background, justifications, and construction of the ‘international crimes’ exception and its consequences on fundamental rights. It calls for a progressive and contextual understanding of this exception in the light of the development of the obligations to criminalise, prosecute, and punish the perpetrators of international crimes.

Chapter 14 on environmental constitutionalism in Bangladesh examines the ‘greening’ of the Constitution that has occurred in line with the global pursuit of sustainable development. In this era of global ecological crises and climate change, there is a greater acknowledgment of the need for domestic recognition, implementation, and efforts to combat and mitigate their impact on human society and Anthropocene. Against the backdrop of indivisibility between environmental and socio-economic development, the quest for sustainable development has influenced the Bangladesh Constitution through the landmark decision in *Dr. M. Farooque v Bangladesh* leading to the insertion of article 18A establishing an inextricable link

between the right to a safe and clean environment with other human rights and constitutional protections. This chapter also provides a critical appraisal of the 2011 amendment which explicitly recognises and protects an environmental right and establishes a regulatory framework giving effect to this right and evaluates its enforceability. It concludes that the Bangladesh Constitution has evolved with international protections to the right to an environment, from single-issue instruments and safeguards to a wider recognition of a clean environment that encompasses many ecosystem interactions, which is currently under threat due to anthropogenic biodiversity loss and climate change.

Chapter 15 develops a constitutional law framework for reforming foreign direct investment (FDI) and intellectual property (IP) law in Bangladesh. It examines within the constitutional law framework what reforms need to be undertaken for an FDI and IP law regime to meet the challenges faced by Bangladesh in fulfilling its target of sustainable development. It shows how a normative framework can be developed based on the constitutional law analysis of FDI regime, the bilateral investment treaties and international investment agreements of Bangladesh. Such a framework can be legal yardsticks for domestic law and policy regulating FDIs in Bangladesh. It emphasises on the recognition of IP law within the Constitution consistent with the constitutional sources and international obligations to make IP law. It identifies the gaps and challenges of the legal regime of FDI and IP within the constitutional law framework of Bangladesh and recommends reforms required to address the challenges to meet the needs of time. Chapter 16 examines the constitutional protection of the Rohingya refugees in Bangladesh. It critically identifies the scope of refugee protection in the Constitution of Bangladesh and applies the protection framework to the Rohingya refugees in Bangladesh to see if these provisions are adequate to ensure and protect refugee status, refugee rights, and solution to the refugeehood by consolidating the permanent methods for local integration. It provides recommendations to overcome the challenges in ensuring the constitutional means of refugee protection in Bangladesh. The chapter concludes by unveiling a constitutional propensity to refugee protection in contradiction to insular national politics and other associated impasses which often gainsay the legitimate claim of these vulnerable groups of refugees.

Chapter 17 on ocean governance and blue economy traces the emerging constitutional rights of the ocean-dependent people and nature in Bangladesh. Following the delimitation of the maritime boundary with the neighbouring countries, blue economic development is now a major policy agenda for Bangladesh. But sustainable blue economic development may be impeded by pollution, unsustainable resources exploitation, and serious impact of climate change on the marine and coastal areas of Bangladesh. This chapter highlights the role of the Constitution in ensuring the rights of the people and nature in the process of blue economic development. The Constitution creates an absolute state ownership of everything in the marine area of Bangladesh. In several decisions, the Supreme Court of Bangladesh liberally interpreted the fundamental right to life to include the right to healthy

environment having implications on rights of the ocean-dependent people in the process of blue economic development. Rights of the nature have been recognised in the 2011 fifteenth amendment of the Constitution and several judgments of the Supreme Court. The chapter finally considers (a) whether a constitutional legal framework for the *right of nature* has been emerged by the decisions of the Court through liberal interpretation of the relevant constitutional provisions, and (b) the implications of these constitutional developments for the blue economy policy of Bangladesh.

Chapter 18 examines (a) the emergence, effect, and influence of massive digital data flow through the Internet on the right to privacy and associated fundamental freedoms that national constitutions and international law purport to protect, and (b) how the Bangladesh Constitution faces and counteracts the challenges posed by the rapidly changing digital technologies. It argues that the right to privacy is in danger because of the Big Data regime collecting, storing, and processing private information unnecessarily and carelessly regardless of their eroding effect on the right to privacy. It calls upon the human rights-based international law and digital constitutionalism to join forces to protect the right to privacy in this digital age.

Part 4 covers the major constitutional remedies. Chapter 19 explains how the non-justiciable constitutional principles entailing economic, social, and cultural rights have been transformed to justiciable rights in Bangladesh. According to its Constitution, civil and political rights are judicially enforceable fundamental rights, while economic, social, and cultural (ESC) rights are judicially unenforceable fundamental principles of state policy. This chapter challenges the traditional assumption of non-justiciability of ESC rights and shows that the constitutional law of Bangladesh in the last 50 years has witnessed a transformation of the non-justiciable ESC rights to justiciable rights through judicial interpretations. It concludes by articulating the path the judiciary in Bangladesh has adopted to extend the scope of judicial enforcement of constitutional principles on ESC rights regardless of an express constitutional bar on the justiciability of these principles.

Chapter 20 critically searches for a coherent and principled interpretive regime of writ jurisdiction in Bangladesh. The writ jurisdiction entrenched in the Constitution of Bangladesh provides for the power of judicial review of administrative, legislative, quasi-judicial, and in some cases judicial actions and inactions. It provides power to enforce the fundamental rights of the citizens and non-citizens. In exercising this power or interpreting its procedure of exercise, the Supreme Court has, directly or indirectly, adhered to some strategic methods by which it has either extended or limited this power. Given that constitution article 102 on the writ jurisdiction is indeterminate in that no specific writ is mentioned, the judges are reposed with a duty to read specific meanings into them and determine their scope and extent. It is within this context that the Supreme Court has leveraged to engage in judicial activism or inactivism. This chapter analyses the

process and strategy by which the Supreme Court as the guardian of the Constitution has, since 1972, exercised the power of writ jurisdiction. It locates the power of judicial review within the principle of separation of powers and enforcement of fundamental rights of people. It argues that the strategies adopted by the Supreme Court in enforcing judicial review has not always been coherent in line with the constitutionalism; rather it has occasionally been driven by some extra-judicial factors.

Chapter 21 examines the emergency powers and martial law under the Constitution of Bangladesh. Although the original Constitution contained no provision on emergency or martial law, a new Part IXA in the Constitution titled 'Emergency Provisions' was inserted in the Constitution through the second amendment of 22 September 1973. Part IXA empowers the executive to proclaim emergencies to deal with actual or imminent threats posed to the nation and suspend the enforcement of the constitutional guarantees during the continuance of an emergency. This chapter demonstrates that in the absence of effective constitutional safeguards constraining the scope of emergency powers, these powers have been conveniently used to subvert the rule of law and impose unwarranted restrictions on the fundamental human rights of the citizens. Also, in the absence of any reference to the proclamation of martial law in the Constitution, Bangladesh witnessed two declarations of martial law in August 1975 and March 1982. The Supreme Court declared them both illegal and unconstitutional in 2010 but failed to determine the constitutionality of the five proclamations of emergency under Part IXA. The chapter concludes with some suggestions for preventing the use of emergency powers for extraneous purposes.

Chapter 22 looks back to project the future of judicial lawmaking as judicial activism in Bangladesh. It adopts a functional approach to critically engage with the reported cases of the Supreme Court of Bangladesh to demonstrate that the judicial lawmaking by the Supreme Court has been a mixed experience. The chapter also surmises what the past judicial lawmaking instances may talk about and influence the future impact of the jurisprudence of lawmaking activism developed by the Supreme Court over the last 50 years since the emergence of Bangladesh. And finally, Chap. 23 examines the scope and development of the idea of public interest litigation (PIL) in the Bangladesh Constitution and how its Supreme Court has expanded the ambit of locus standi of PIL. Such a socially motivated gateway to the Court has been abused to the extent that the Court had to intervene to differentiate between PIL and private interest litigation. Eventually establishing a framework in 1916, the Court has somewhat narrowed down the ambit of locus standi in PIL. The chapter critically evaluates the journey of PIL in Bangladesh over the last 50 years and lays a roadmap for the future.

References

Books

- Ahmed, Nizam. 2020. *Parliaments in South Asia: India, Pakistan and Bangladesh*. Routledge.
- Albert, Richard. 2019. *Constitutional Amendments: Making, Breaking, and Changing Constitutions*. New York: OUP.
- Brewer-Carías, Allan R. 2011. *Constitutional Courts as Positive Legislators: A Comparative Law Study*. Cambridge/New York: Cambridge University Press.
- Croissant, Aurel, et al. 2013. *Democratization and Civilian Control in Asia*. London: Palgrave Macmillan.
- Dann, Philipp, et al., eds. 2020. *The Global South and Comparative Constitutional Law*. OUP.
- Dixon, Rosalind, and David Landan. 2021. *Abusive Constitutional Borrowing*. New York: OUP.
- Frankenberg, Günter. 2018. *Comparative Constitutional Studies: Between Magic and Deceit*. Cheltenham: Edward Elgar.
- Hoque, Ridwanul. 2011. *Judicial Activism in Bangladesh: A golden Mean Approach*. Newcastle upon Tyne: Cambridge Scholars Publishing.
- Hossain, Sara, et al., eds. 1997. *Public Interest Litigation in South Asia: Rights in Search of Remedies*. Dhaka: University Press Ltd.
- Kai Möller, Kai. 2012. *The Global Model of Constitutional Rights*. Oxford: OUP.
- Maldonado, Daniel Bonilla, ed. 2013. *Constitutionalism of the Global South*. Cambridge: Cambridge University Press.
- Roznai, Yaniv. 2017. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*. Oxford: OUP.
- Suteu, Silvia. 2021. *Eternity Clauses in Democratic Constitutionalism*. Oxford: OUP.
- Tan, Kevin Y.L., and Ngoc Son Bui, eds. 2019. *Constitutional Foundings in South Asia*. New York: Hart Publishing.
- Tan, Kevin, and Ridwanul Hoque. 2021. *Constitutional Foundings in South Asia*. Oxford: Hart Publishing.
- Tushnet, Mark. 2008. *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton: Princeton University Press.

Chapters in Edited Books

- Albert, Richard, and Bertil Emrah Oder. 2019. The Forms of Unamendability. In *An Unamendable Constitution? Unamendability in Constitutional Democracies*, ed. Richard Albert and Bertil Emrah Oder, 1. Dordrecht: Springer.
- Albert, Richard, and Menaka Guruswamy. 2019. Introduction: Mapping the Founding. In *Founding Moments in Constitutionalism*, ed. Richard Albert, Menaka Guruswamy, and Nishchal Basnyat, 1–5. Chicago: Hart Publishing.
- Albert, Richard. 2019. Amendment and Revision in the Unmaking of Constitutions. In *Comparative Constitution Making*, ed. David Landau and Hanaa Lerner, 117–141. London: Edward Elgar.
- . 2017. Introduction: The State of the Art in Constitutional Amendment. In *The Foundations and Traditions of Constitutional Amendment*, ed. Richard Albert, Xenophon Contiades, and Alkmene Fotiadou, 1–2. Hart.

- Frankenberg, Günter. 2012. Comparative Constitutional Law. In *The Cambridge Companion to Comparative Law*, ed. Mauro Bussani and Ugo Mattei, 171. Cambridge: Cambridge University Press.
- Ginsburg, Tom, and Alberto Simpser. 2014. Introduction: Constitutions in Authoritarian Regimes. In *Constitutions in Authoritarian Regimes*, ed. Tom Ginsburg and Alberto Simpser, 1. New York: Cambridge University Press.
- Ginsburg, Tom, and Aziz Z. Huq. 2016. Assessing Constitutional Performance. In *Assessing Constitutional Performance*, ed. Tom Ginsburg and Aziz Z. Huq, 3–38. New York: Cambridge University Press.
- Groppi, Tania, and Marie-Claire Ponthoreau. 2013. Introduction. In *The Use of Foreign Precedents by Constitutional Judges*, ed. Tania Groppi and Marie-Claire Ponthoreau, 9. Oxford: Hart Publishing.
- Haque, Muhammad Ekramul. 2022. Constitutional Protection of Economic and Social Human Rights: Intention of the Constitution-Makers and Judicial Interpretations. In *A History of the Constitution of Bangladesh: The Founding, Development, and Way Ahead*, ed. Ridwanul Hoque and Rokeya Chowdhury. Routledge. (forthcoming).
- Hirschl, Ran. 2018. Judicial Review and the Politics of Comparative Citations: Theory, Evidence and Methodological Challenges. In *Comparative Judicial Review*, ed. Erin F. Delaney and Rosalind Dixon, 403–422. Edward Elgar.
- Hoque, Ridwanul. 2014. Constitutionalism and the Judiciary in Bangladesh. In *Comparative Constitutionalism in South Asia*, ed. Sunil Khilnani et al., 303. OUP.
- . 2019. Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and for All? In *An Unamendable Constitution? Unamendability in Constitutional Democracies*, ed. Richard Albert and Bertil Emrah Oder, 195–229. Springer.
- . 2015. The Judicialization of Politics in Bangladesh. In *Unstable Constitutionalism—Law and Politics in South Asia*, ed. Mark Tushnet and Madhav Khosla, 261. Cambridge: Cambridge University Press.
- Landau, David. 2017. Judicial Role and the Limits of Constitutional Convergence in Latin America. In *Comparative Constitutional Law in Latin America*, ed. Rosalind Dixon and Tom Ginsburg, 227–252. Northampton: Edward Elgar.
- Saunders, Cheryl. 2014. Judicial Engagements. In *Comparative Constitutional Law in Asia*, ed. Rosalind Dixon and Tom Ginsburg, 80–101. Cheltenham: Edward Elgar.
- Shapiro, Martin. 2016. Parties and Constitutional performance. In *Assessing Constitutional Performance*, ed. Tom Ginsburg and Aziz Z. Huq, 134–144. Cambridge University Press.
- Tushnet, Mark. 2018. Amendment Theory and Constituent Power. In *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor, 317. Edward Elgar.

Articles

- Ahmed, Nizam. 2003. From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973–2001). *Pacific Affairs* 76 (1): 68–69.
- Amundsen, Inge. 2016. Democratic Dynasties? Internal Party Democracy in Bangladesh. *Party Politics* 22 (1): 49–58.
- Bari, M. Ehteshamul. 2017. Preventive Detention Laws in Bangladesh and Their Increased Use During Emergencies: A Proposal for Reform. *Oxford University Commonwealth Law Journal* 17: 45–74.
- Bhuiyan, Azhar U. 2021. The Doctrine of Public Trust: Its Judicial Invocation in Bangladesh and the Future Potentials. *Jahangirnagar University Journal of Law* 9 (1): 99–118.
- Fallon, Richard H., Jr. 2005. Legitimacy and the Constitution. *Harvard Law Review* 118: 1787.
- Fish, M. Steven. 2006. Stronger Legislature, Stronger Democracies. *Journal of Democracy* 17 (1): 5–20.

- Hakim, Muhammad A. 1998. Bangladesh: The Beginning of the End of Militarised Politics? *Contemporary South Asia* 7 (3): 283–300.
- Haque, Muhammad Ekramul. 2016. Formation of the Constitution and the Legal System in Bangladesh: From 1971 to 1972: A Critical Legal Analysis. *Dhaka University Law Journal* 27 (1): 41–56.
- Islam, Md Rizwanul. 2016. Judges as Legislators: Benevolent Exercise of Powers by the Higher Judiciary in Bangladesh With Not So Benevolent Consequences. *Oxford University Commonwealth Law Journal* 16: 219–234.
- Jahan, Rounaq. 2015. The Parliament of Bangladesh: Representation and Accountability. *Journal of Legislative Studies* 21 (2): 250–269.
- Landau, David. 2013. Abusive Constitutionalism. *UC Davis Law Review* 47: 189.
- Mostofa, Shafi Md, and D.B. Subedi. 2021. Rise of Competitive Authoritarianism in Bangladesh. *Politics and Religion* 14 (3): 431–459.
- Naznin, Atia. 2021. Women's Right to Access to Justice: The Role of Public Interest Litigation in Bangladesh. *Australian Journal of Asian Law* 21 (2): 99–117.
- Rahman, Tahmina. 2019. Party System Institutionalization and Pernicious Polarization in Bangladesh. *ANNALS of the American Academy of Political and Social Science* 681 (1): 173–192.
- Askvik, Steinar, and Ishtiaq Jamil. 2013. The Institutional Trust Paradox in Bangladesh. *Public Organization Review* 13 (4): 466–470.
- Tushnet, Mark. 2015. Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power. *International Journal of Constitutional Law* 13 (3): 639.
- Wolf, Siegfried O. 2013. Civil-Military Relations and Democracy in Bangladesh. *Spotlight South Asia*(special Issue) 14–30.
- Yap, Po Jen, and Rehan Abeyratne. 2021. Judicial Self-dealing and Unconstitutional Constitutional Amendments in South Asia. *International Journal of Constitutional Law* 19 (1): 127–148.

Encyclopedia

- Haque Muhammad Ekramul. 2021a. The Proclamation of Independence, 1971: Unilateral Declaration of Independence of Bangladesh. *Encyclopedia of Public International Law in Asia* (Brill/Nijhoff) vol 3.
- . 2021b. Use of International Law in Interpreting Constitutional Rights in Bangladesh. *Encyclopedia of Public International Law in Asia* (Brill/Nijhoff) vol 3.

Documents

- Bangladesh Constituent Assembly Debates (*Gono Parishader Bitarka, Sarkari Biboroni*), 1972 (Governmental Records, Part I & II).

Internet Sources

- Oliver, Peter C. 2016. Autochthonous Constitutions. *Max Planck Encyclopedia of Comparative Constitutional Law*. <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e12?> Accessed 12 Aug 2022.

Other Sources

- Ahmed, Naim. 1998. *Litigating in the Name of the People: Stresses and Strains of the Development of Public Interest Litigation in Bangladesh*. PhD Thesis. London: SOAS.
- Chowdhury, M. Jashim Ali. 2022. *The “Westminster” Parliament of Bangladesh: A Critical Evaluation*. PhD thesis at. London: King’s College.
- Jahan, Rounaq, and Amundsen. 2012. *The Parliament of Bangladesh: Representation and Accountability*. Centre for Policy Dialogue and Chr. Dhaka/Bergen: Michelsen Institute.

M Rafiqul Islam is an Emeritus Professor of Law at Macquarie University, Australia. He obtained BA Honours (Economics) in 1973 and MA(Economics) in 1974 and LLB (first class) in 1975 from Rajshahi University, Bangladesh; and LLM in 1979 and PhD in 1983 from Monash University, Australia. His legal teaching and research career at universities spans over 45 years. He has been an active legal academic and researcher and published extensively mostly on public international law. His major publications inclusively include: *International Trade Law of the WTO* (Oxford University Press, 2006); *An Introduction to International Refugee Law* (Brill/Martinus Nijhoff, Leiden/Boston, 2013, co-ed); *International Law: Current Concepts and Future Directions* (LexisNexis Australia, 2014); *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgments* (Brill/Nijhoff, Leiden/Boston and University Press Limited, Dhaka 2019). Professor Islam was the Director of Higher Degree Research (PhD and MPhil) and has actively been involved in the administration and supervision of research leading to Master of Research (M Res), M Phil, and PhD degrees. He was awarded the ‘Outstanding Teacher Award’ by Macquarie University in 2000, the Macquarie University Arts Faculty Best Higher Degree Research Supervisor Award in 2013 and the Vice Chancellor Award in 2016.

Muhammad Ekramul Haque PhD is a Professor of Comparative Constitutional Law at the University of Dhaka, obtained his PhD in Constitutional Law and International Law from Monash University, Australia, and a leading scholar in constitutional law and comparative constitutional law in Bangladesh. His research on constitutional law focuses on how comparative constitutional experience and international law reflect and help shape the understanding and development of the Bangladesh Constitution and its interpretations. He is the State Volume Editor of Bangladesh in Encyclopedia of Public International Law in Asia (Brill/Nijhoff, 2021), Section Editor of International Law in the International Handbook of Disaster Research (Amita Singh ed., Springer-Nature), a Rapporteur in Asian Yearbook of International Law (Brill), serves on the Governing Body of Development of International Law in Asia, and a member of the Research Group on ‘Cross-Judicial Fertilization: The Use of Foreign Precedents by Constitutional Judges’, International Association of Constitutional Law and the International Society of Public Law ICON•S. He has authored the Monograph on the constitutional law of Bangladesh in International Encyclopaedia of Constitutional Law, (Kluwer Law International, forthcoming) and is co-editor of a forthcoming book titled: Implementation of Sustainable Development in the Global South: Strategies, Innovations and Challenges (HART Publishing).

Part I
Constitution-Making, Changes and
Philosophy

Chapter 2

The Making of the Constitution of Bangladesh and Making It Work



Kamal Hossain

Abstract This chapter encompasses the context in, and process by, which the Constitution of Bangladesh was framed after independence, and how the challenges of making a constitution in a newly independent country were overcome. It discusses in hindsight the making of the Constitution, intentions of the Constitution makers, spirit of the Constitution, and how constitutions of different countries, international law, and the history of struggle of the Bangladeshi people had an influence on drafting the Constitution. It also examines the vision and expectations of those involved in the making of the Constitution regarding its future impact on state and society.

Keywords Constitution-making process · Fundamental principles · Judiciary · Constitutional accountability · Separation of powers · Parliamentary democracy · Constitutional deviations

2.1 Introduction

A constitution has been described as ‘the *autobiography of a nation* which reflects its historical experience’.¹ To adopt the language of Justice Albie Sachs, one of the architects of the new Constitution of the Republic of South Africa:

Acknowledgments are due to Priya Ahsan Chowdhury for her assistance.

¹ Albie Sachs, *Protecting Human Rights in a New South Africa* (OUP, Cape Town, 1990) vi (emphasis added).

K. Hossain (✉)
Supreme Court of Bangladesh, Dhaka, Bangladesh
e-mail: khossain@citechco.net

If a constitution is the autobiography of a nation, then we are the privileged generation that will do the writing. It is something that involves us all ... no one gives us rights, we gain them in struggle. They exist in our hearts before they exist on paper. Yet the intellectual struggle is one of the most important areas of the battle for rights. It is through concepts that we link our dreams to the acts of daily life.²

It was through a historic liberation struggle that Bangladesh won its right to make a constitution. Since the mid-sixties its struggle for rights was expressed in terms of constitutional demands. These were embodied in the six-points programme, later embraced in the eleven-points programme. Underlying the constitutional demands was a yearning for freedom and justice. A new constitutional order was expected to empower people. With the end of the British colonial rule in 1947, the people of the eastern wing of the Federation of Pakistan, who constituted the majority, expected to become masters of their own destiny within a democratic state. It was anticipated that political power would be used to achieve both political and economic emancipation. The overwhelming majority of the population comprised of peasants and working people who, during the colonial period, had suffered economic deprivation as *projas* (subjects) under an exploitative *zamindari* system, introduced by the Permanent Settlement.³ Landlessness, indebtedness, and pervasive poverty had characterised the lives of ordinary men and women.

The fifties witnessed an upsurge of people's power. Between 1952 and 1954, a nascent Bengali nationalism gained enormous strength through the Language Movement as demonstrated in the electoral victory of 1954. But this early demonstration of people's power was not followed by a process of consolidation through establishing enduring institutions. The martial law of 1958 in Pakistan was intended to curb that power and to establish an authoritarian political system, dependent on the military, which would deprive the people of their political, economic, social, and cultural rights.

The dreams which were woven into the constitutional demands were those of a democratic political order in which power would truly belong to the people, to be exercised through a sovereign parliament, composed of representatives elected based on universal adult franchise.⁴ This parliament would bring about social and economic transformation.⁵ It was clearly expected that the true representatives of the people would be totally committed to ending exploitation through implementing programmes for fundamental economic and social change.⁶

It is in this brief contextual background that this chapter summarises the events leading to the framing of the Constitution, including the Proclamation of Independence, convening of the Constituent Assembly, formation of the drafting

² *ibid.*

³ Peshotan Nasserwanji Driver, *Problems of Zamindari and Land Tenure Reconstruction in India* (New Book Company, Bombay, 1949) 53–82.

⁴ Kamal Hossain, *Bangladesh: Quest for Freedom and Justice* (The University Press Limited, Dhaka 2013) 141.

⁵ *ibid.*

⁶ *ibid.*

committee, and presentation of the Constitution Bill. It then highlights various parts of the Constitution beginning with the identification of Bangladesh as a republic, the national anthem, the state language, constitutional supremacy, and most importantly, people's ownership of all powers in the Republic under Part 1 of the Constitution. Part 2 then outlines the fundamental principles of state policy and the thoughts behind their framing. The next section discusses the guaranteed fundamental rights in Part 3 of the Constitution. This is followed by discussion on establishment and functions of the executive in Part 4, Parliament in Part 5, and the framework for an independent judiciary in Part 6. The administering of the Republic through establishing special tribunals, if necessary, formation of an independent election commission, and methods of amending the Constitution are discussed in the next section. The penultimate section is on the struggle behind practical implementation of the Constitution, and it sets out a call to reignite national efforts to make the Constitution functional.

2.2 Making of the Constitution: The Ecstasy

The Proclamation of Independence establishing the People's Republic of Bangladesh as a sovereign and independent state also provided for framing a constitution by a constituent assembly,⁷ comprising the elected representatives of the people of Bangladesh (elected in the first ever national election held in Pakistan in 1970). One of the earliest acts after victory in the Bangladesh liberation war was to convene the Constituent Assembly⁸ in Dhaka on 10 April 1972.⁹ The reconvened Constituent Assembly had adopted a Resolution declaring the principles of nationalism, democracy, socialism, and secularism to be the basic principles of the state and the fundamental principles upon which the constitution was to be based.¹⁰

The Constituent Assembly proceeded to form a Constitution Drafting Committee, which this author was privileged to chair, at the direction of Bangabandhu Sheikh Mujibur Rahman (Bangabandhu), the Founding Father of the Nation of Bangladesh.¹¹ It had amongst its members those who led the independence movement including the closest colleagues of Bangabandhu, namely Syed Nazrul Islam, Tajuddin

⁷ Proclamation of Independence, 10 April 1971, para 14; for the text, (1971) 11 *International Legal Materials* 119; *Bangladesh Documents I* (Ministry of External Affairs, New Delhi, 1971) 281–82; (1974) 4 *New York University Journal of International Law and Politics* 557; Muhammad Ekramul Haque, 'The Proclamation of Independence, 1971: Unilateral Declaration of Independence of Bangladesh', *Encyclopedia of Public International Law in Asia* (Brill/Nijhoff, 2021) vol 3, 21.

⁸ Bangladesh Constituent Assembly Order, 1972 (Presidential Order No. 22 of 1972).

⁹ Muhammad Ekramul Haque, 'Formation of the Constitution and the legal system in Bangladesh: From 1971 to 1972: A critical legal analysis' (2016) 27(1) *Dhaka University Law Journal* 41–56.

¹⁰ The Constituent Assembly Resolution of 10 April 1972.

¹¹ The Constituent Assembly Resolution of 11 April 1972.

Ahmed, Mansur Ali, and Kamzruzzaman.¹² Any recollection about the making of the Constitution cannot begin without an express of reverence to the leaders who had given historic leadership in our liberation struggle. The author also acknowledges the valuable contributions made by two of the former Vice-Chancellors of the University of Dhaka, the late Justice Abu Sayeed Chowdhury and late Professor Muzaffar Ahmed Chowdhury. Professor Anisuzzaman, from the first day, was associated with the task of drafting the Bangla (national language) text, and for all practical purposes was a member of the Constitution Drafting Committee. In comments below, the author has drawn from his statement made before the Constituent Assembly when presenting the Constitution Bill.¹³ Following consultations and review by the members of the Committee, and others, the Constitution was finally adopted and enacted after nine months, on 4 November 1972, and came into force on 16 December 1972.¹⁴

2.2.1 Building the Republic

Part I of the original Constitution of 1972 declared the existence of Bangladesh as ‘a unitary independent sovereign Republic ... known as the People’s Republic of Bangladesh’ (art 1). The territory of the Republic was defined as those ‘territories which immediately before the Proclamation of Independence on the 26th day of March, 1971 constituted East Pakistan’ (art 2). Bangla was declared to be the state language of the Republic (art 3). Rabindranath Tagore’s ‘Amar Sonar Bangla...’ was adopted as the national anthem (art 4). The most important of all articles was article 7 which affirmed the supremacy of the people and the Constitution. It proclaimed that ‘all powers in the Republic belong to the people, and that their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution’ (art 7(1)). It was also affirmed that the Constitution was ‘the solemn expression of the will of the people’ and ‘the supreme law of the Republic’, and that any other law if inconsistent with the Constitution, to the extent of such inconsistency, would be void (art 7(2)).

2.2.2 Framing the Direction of the State

Part II of the Constitution related to fundamental principles of state policy. It declared nationalism, socialism, democracy, and secularism to be the fundamental principles of state policy, and further enunciated several principles derived from

¹² *ibid.*

¹³ The Constituent Assembly Debate of 12 October 1972.

¹⁴ The Constitution of the People’s Republic of Bangladesh, *The Bangladesh Code*, vol XV, 1–221.

these four principles (art 8(1)). These fundamental principles sought to spell out the vision of an exploitation-free society that represented the aspirations of the people of Bangladesh.¹⁵ It provided that national unity and solidarity of the people of Bangladesh were the bases on which the Republic was established (art 9). It further provided that, '[a] socialist economic society would be established with a view to ensure the attainment of a just and egalitarian society, free from the exploitation of man by man' (art 10).¹⁶

The Constitution provided that:

The Republic shall be a democracy, in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured (art 11).

The principle of secularism shall be realised by the elimination of (a) communalism in all its forms; (b) the granting by the State of political status in favour of any religion; (c) the abuse of religion for political purposes; [and] (d) any discrimination against, or persecution of, persons practicing a particular religion (art 12).

These provisions reflected the collective determination of the people of Bangladesh to exorcise the dark forces of communalism and religious bigotry from the soil of Bangladesh which had wrought such horrors in the pre Liberation period, in particular by the Pakistan Army during the Liberation War of Bangladesh in 1971. This, however, in no way precluded the full and free practice of religion or belief by any person or religious groups.

The principles set out in Part II of the Constitution defined the principal features of an exploitation-free economy. The principles of ownership were clearly set out, namely that the people would 'own and control the instruments and means of production' (art 13) so that the key sectors of the economy would be owned by the state on behalf of the people in a nationalised public sector. Subject to this condition, there would be co-operative and private ownership within such limits as may be prescribed by law (art 13(b)).

The 'fundamental responsibility of the state to emancipate toiling masses the peasants and workers and backward sections of the people from all forms of exploitation' was recognised (art 14). Such emancipation was to be attained:

[T]hrough planned economic growth, and a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens –

- (a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care;
- (b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work;
- (c) the right to reasonable rest, recreation and leisure; and

¹⁵The preamble of the Bangladesh Constitution.

¹⁶If writing today, the drafters would certainly have used more gender-inclusive language, recognising the role and experience of women alongside men.

- (d) the right to social security, that is to say, public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases (art 15).

Part II also comprised other basic principles, and social and economic objectives. These included adoption of effective measures ‘to remove disparity in standards of living between the urban and the rural areas’ (art 16); the establishment of ‘a uniform mass oriented and universal system of education’ (art 17(a)) based on the needs of society; and ‘raising of the level of nutrition and the improvement of public health’ (art 18).

It was further provided that, ‘[t]he State shall endeavour to ensure equality of opportunity to all citizens’, and in particular the equitable distribution of opportunities ‘in order to obtain a uniform level of economic development throughout the Republic’ and to ‘adopt effective measures to remove social and economic inequality between man and man’ (art 19(1–2)). Through the 15th amendment in 2011, a provision was added which stated that, ‘[t]he State shall endeavour to ensure equality of opportunity and participation of women in all spheres of national life’ (art 19(3)). Work was recognised as ‘a right, a duty, and a matter of honour for every citizen’ (art 20(1)), and it was provided that, [t]he State shall endeavour to create conditions in which... persons shall not be able to enjoy unearned incomes...’ (art 20(2)). That ‘[t]he duty of every citizen to observe the Constitution and the laws, maintain discipline, to perform public duties and to protect public property’, and every public servant ‘to strive at all times to serve the people’ was affirmed (art 21).

The principle of ‘separation of the judiciary from the executive organs of the State’ was clearly affirmed (art 22). The basis of the relationship of Bangladesh with other states was set out, asserting it would ‘base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter’ (art 25). The commitment was affirmed to ‘support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism, or racialism’ (art 25).

These fundamental principles were affirmed to be ‘fundamental to the governance of Bangladesh’; it was stated that these principles would be applied ‘in the making of laws, and shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh’; and that they would ‘form the basis of the work of the State and of its citizens’ (art 8(2)). The fundamental, social, and economic transformation of the country was envisaged as resulting from the application of these principles.¹⁷ The attainment of such goals involved the making of necessary laws, and the enforcement of laws and policies by the executive authority.¹⁸ This would involve planning, adequate allocation of resources, and a total effort on the part of all people, both in the government and outside.¹⁹

¹⁷ Hossain, *Bangladesh: Quest for Freedom and Justice* (n 4) 147.

¹⁸ *ibid.*

¹⁹ *ibid.*

2.2.3 *Guaranteeing People's Rights*

The commitment of Bangladesh to democracy was re-affirmed by the constitutional protection which was afforded to fundamental rights, as enumerated in Part III of the Constitution. These included rights to equality before law and equal protection of the law (art 27), non-discrimination on grounds of race, religion, caste, sex, or place of birth (art 28), equality of opportunity in public employment (art 29), prohibition of titles, honour, award and decorations from any foreign state without prior approval of the President (art 30), protection of law and treatment in accordance with law (art 31), life and personal liberty (art 32), safeguards as to arrest and detention (art 33), prohibition of forced labour (art 34), protection in respect of trial and punishment (art 35), freedom of movement (art 36), freedom of assembly (art 37), freedom of association (art 38), freedom of thought and conscience and speech (art 39), freedom of profession or occupation (art 40), freedom of religion (art 41), property (art 42) and protection of home and correspondence (art 43).

All these rights were constitutionally guaranteed, with some being subject to reasonable restrictions for certain specified purposes mentioned in these provisions. It was part of the concept of fundamental rights that restrictions which a Court would accept to be reasonable for the purposes specifically enumerated in the Constitution could be considered legitimate restrictions upon such rights. It is particularly noteworthy that the Constitution Drafting Committee and the Constituent Assembly made certain constitutional innovations to uphold the principles of rule of law by excluding any provision for 'preventive detention' and excluding any provision for suspension of fundamental rights.

In respect of the right to property and the right to profession, occupation, trade, or business, it was however provided that these rights were subject to any restrictions that may be made by law (art 40, 43). In other words, these rights may be enjoyed to the extent to which the law made by Parliament may permit. A further provision was made protecting the laws pertaining to compulsory acquisition and nationalisation of property (art 42), and certain other laws which may be declared by Parliament to be required for implementing the fundamental, social, and economic goals set out in the Fundamental Principles of State Policy (art 47(1)). These provisions relating to property, trade, and business were part of a strategy to achieve the re-structuring of the economy through a democratic process. The Constitution Drafting Committee believed that so long as the Constitution did not create obstacles in the way of altering property relations, and imposing restrictions on the right to property, trade, and business, both of which were necessary for establishing an exploitation-free economy, progress could be made in a planned and phased manner to bring about a fundamental change in the economic order in favour of inclusion and eliminating gross disparities of wealth.

The Constitution Drafting Committee had sought to learn from the bitter experience of many countries where the attempt to give a greater protection to property rights, and the rights of trade and business had created constitutional obstacles in making changes in property relations, and thus in the economic order, through

legislation. It believed that in a society such as ours where extreme inequalities had existed, and where the overwhelming majority of the people could be regarded as have-nots, it was imperative that property relations be radically altered. This was pertinent to ensure the establishment of an exploitation-free economy which would ensure that the people owned and controlled instruments, and the means of production, and where people equitably shared the fruits of production and national wealth.

2.2.4 Setting Up a Functional Parliamentary Democracy

The commitment to the establishment of democracy was further strengthened through the provisions made in Part IV (the executive) and Part V (the legislature) of the Constitution, which considered together, provided for the functioning of a full-fledged parliamentary democracy.

Part IV provided that the President would be a constitutional Head of State (art 48(2)). The executive authority of the Republic would be exercised by the Prime Minister (art 55(2)), a person who would enjoy the confidence of the majority of the members of Parliament (art 56(3)). The Cabinet was made collectively responsible to Parliament (art 55(3)). It was also provided that war could not be declared except by Parliament (art 63), and that maintenance, discipline, and other matters relating to the Defence Services would be regulated through law made by Parliament (art 62(1)). This Part, among others, further provided for the office of the Attorney-General to be appointed by the President from amongst persons qualified to be appointed as a Judge of the Supreme Court, as an independent law officer of the Republic to perform duties assigned by the President (art 64).

Part V provided for a Parliament consisting of 300 members to be elected from single member territorial constituencies (art 65(2)) based on adult franchise (art 122(1)). Parliament was given full control over law-making and the budget (art 65(1), 80, 81). For Parliament to be fully effective, certain significant improvements were made by providing that Standing Committees would be established by Parliament not only to oversee Public Accounts but also to examine draft Bills and legislative proposals, measures for better enforcement of the laws, and to investigate questions of public importance (art 76). Provisions were made for Parliament to create an office of ombudsman (art 77), thus introducing into our system one of the most successful of the recent constitutional innovations introduced in many parliamentary democracies, notably Sweden, Denmark, Finland, and Albania, among others. Another very significant provision which represented a marked improvement on many democratic constitutions, was for the establishment of an effective Local Government System in different administrative units consisting of elected representatives of the people (art 59).

2.2.5 *Establishing an Independent Judiciary*

Part VI of the Constitution provided for an independent judiciary headed by a Supreme Court to be established, consisting of an Appellate Division (AD) which would be the final appellate forum, and a High Court Division (HCD) (art 94(1)) which would have unlimited original jurisdiction and be invested with powers referred to as the writ jurisdiction (art 101, 102).

The Constitution Drafting Committee had deemed it necessary to provide for an integrated Supreme Court consisting of the HCD and AD following the example which had found favour in unitary states. A Supreme Court, separate and apart from the High Court, would imply that the former was the highest court and that the latter being a court below the Supreme Court would lose its present character. It could risk fragment action, thus destroying the character of having a single court with unlimited original jurisdiction invested with a writ jurisdiction, and powers to enforce fundamental rights embodied in the Constitution. The Constitution expressly provided for the long-aspired goal of separation of the judiciary from the executive. All judicial officers including magistrates exercising judicial functions would be subject to control of the HCD in respect of posting, promotion, grant of leave, and discipline (art 116). The HCD was also given a controlling role in their appointment (art 115).

2.2.6 *Administering the Republic*

Another innovation was a provision made for specialised Administrative Tribunals for certain matters (art 117), which would provide genuine and rapid redress while reducing the burden on the writ jurisdiction. Such Tribunals were provided for in the case of service matters, property vested in the Government under any law including nationalised enterprises or statutory public authorities, the laws relating to property, trade and business, and certain other specific laws which were kept out from the purview of the writ jurisdiction.²⁰

For the effective functioning of democracy, an independent Election Commission was charged with the duty of holding fair and free elections (art 118). It was to prepare the Electoral Rolls and enroll every person above 18 years of age (art 119). All by-elections were required to be held within 90 days. The independence of the members of the Election Commission was preserved by the provision that they were not removable except on the similar grounds and in like manner as a Supreme Court Judge (art 118(5)). The same safeguard was extended to members of the Public Service Commission and provision was made for the establishment of such Commissions (art 139(2)).

²⁰ Hossain, *Bangladesh: Quest for Freedom and Justice* (n 4) 154.

Part X of the Constitution provided for amendment of the Constitution by two-thirds majority of the total members of the Parliament (art 142). The concluding article provided that the text of the Constitution would be in Bengali and for an authorised and authenticated English translated text; In case of conflict, the Bengali text would prevail (art 153(2)).

The Constitution Drafting Committee believed that its Constitution Bill represented a sincere attempt to work out the four basic principles of nationalism, democracy, socialism, and secularism which, if properly applied, could lead towards a society free from exploitation. In such a society, all people could enjoy social, economic, and political justice, the rule of law would be secured, fundamental human rights would be guaranteed, and the people and their posterity in freedom would prosper. This experience of making of the Constitution, in the Constitution Drafting Committee and in the Assembly itself, might be described as ‘the ecstasy of Constitution making’, in which all Committee members shared the exhilaration of translating their dreams into the text of the Constitution.²¹ What was to follow was the harnessing of national energies to make this Constitution work and to achieve the goals which the Drafting Committee had set out in it in the best interest of a democratic Bangladesh.

2.3 Making the Constitution Work: The Agony

The post-colonial state as it emerged at the advent of independence was cast in the mould of a liberal democracy. A democratic political system was meant to build a just society. The fundamental principles of state policy in the Constitution provided clear signposts directing the state through the development of the national economy to secure basic rights to food, shelter, education, health, and work (art 15). Three specific signposts called upon the state to ‘endeavour to ensure equality of opportunity for all citizens’ (art 19(1)), ‘adopt effective measures to remove social and economic inequality between man and man’ (art 19(2)), and to adopt effective measures to bring about a radical transformation in the rural areas to ‘progressively remove disparity in the standards of living between the urban and the rural areas’ (art 16).

Today, some 50 years later, the people of Bangladesh can only lament that the dreams woven into the text of the Constitution are yet to be translated into reality. One recalls the response of Jawaharlal Nehru in 1958 when André Malraux asked him about his greatest difficulty since independence. Nehru’s answer was, ‘creating a just state by just means’, adding ‘perhaps, too, creating a secular state in a religious country’.²² These words have a strong contemporary ring in our society in Bangladesh.

²¹ Kajalie Shehreen Islam, ‘Interview with Dr. Kamal Hossain: On Realising Our Constitutional Dreams’ *The Daily Star* (Dhaka, November 2010) <<https://archive.thedailystar.net/forum/2010/November/dreams.htm>> accessed 5 March 2023.

²² Vikas K Choudhary, ‘*The Idea of Religious Minorities and Social Cohesion in India’s Constitution: Reflections on the Indian Experience*’ (2021) 12(11) *Religions* 910 <<https://doi.org/10.3390/rel12110910>> accessed 19 July 2022.

The years after the making of the Constitution experienced repeated assaults upon the Constitution. The cataclysmic events of unconstitutional access to governmental power through a violent military coup in August 1975, and the brutal massacre of the Father of the Nation and almost all members of his family, led to the establishment and continuance of authoritarian martial law regimes. These events led effectively to the disempowerment of people and paralysis of democratic institutions such as Parliament and removed the possibility of an accountable administration responsive to public needs and interest.²³ The authoritarian regimes instead of nurturing participatory and decentralised democratic institutions envisaged in the Constitution, consciously promoted a bureaucratically controlled administration, responsive to central directives, and contributed to arbitrary and corrupt modes of exercising power in the absence of accountability. The emergence of an all-powerful executive led to the significant erosion of the rule of law.

The state became captive to an alliance of powerful groups. Power was concentrated at the apex which became progressively less and less accountable.²⁴ Thus, even when military regimes were formally replaced by elected civilian governments, it only introduced the formal trappings of democracy, and control of the state became more and more a function of muscle and money. This in turn meant the continued erosion of accountability and the rule of law.

A perceptive analysis of the situation in South Asia has been expressed as follows:

The process of empowerment should also generate new notions of power itself, and the purpose for which it is wielded. Present-day notions of power – evolved in a hierarchical, male-dominated society – are based on divisive, destructive, and oppressive values which encourage aggression, competition, and corruption, regardless of whether it is men or women wielding power. The need is for a new understanding of power itself – not one of control and exploitation for personal gain, but the power of sharing, giving, creating, and developing the potential of every human being.²⁵

The above perception of power in South Asian is reflected in the power politics of Bangladesh. Its citizens have had to endure the agony of impediment after impediment being put in their way to realise the goals of the Constitution which were intended to provide the framework for a humane, just, and democratic order in which all people could enjoy their basic human rights.²⁶

²³ SM Shamsul Alam, 'Democratic politics and the fall of the military regime in Bangladesh' (1995) 27(3) *Bulletin of Concerned Asian Scholars* 28–42 <<https://www.tandfonline.com/doi/abs/10.1080/14672715.1995.10413048>> accessed 19 July 2022.

²⁴ *ibid.*

²⁵ Kanwaljit Soin, *The Empowerment of Women* (Association of Women for Action and Research, Singapore 1998) 18–19 as cited in Chris Hudson, *Beyond Singapore Girl: Discourses of Gender and Nation in Singapore* (NIAS Press, Singapore 2013).

²⁶ Islam (n 21).

2.4 Need for Renewed National Effort to Make the Constitution Work

The exhilaration of liberation and in the making of the Constitution were experienced in Bangladesh when people's power emerged as an invincible force, born out of a purposeful unity forged in pursuit of freedom and justice. People celebrated victories which humbled tyrannical power that appeared to be indestructible. Yet the fruits of victory prove to be all too elusive, even today. Tyranny and injustice were re-born in different periods in new guises, and behind new masks.

The question which faces Bangladesh today is how people's power can endure to build a society in which freedom and justice will be sustained through enduring institutions.²⁷ It will no longer work to present formula answers to this question by simply prescribing empowerment, participation, and democratisation.²⁸ These have been all but reduced to slogans – to which lip service is ritually paid, but little is done to make them living realities.²⁹ Instead, it is now imperative to think of strategies, and to learn from our collective successes and failures. While failures are many, there are some significant successes to recall.³⁰

Bangladesh needs to recognise the imperative of nurturing in civil society a durable unity based on a sincere commitment to certain core human values – human dignity and the fundamental rights that derive from it, equality of all persons, equality before the law, equality of opportunity, and the rule of law, including the independence of the judiciary.³¹ This unity must transcend differences of ethnicity, gender, religion, caste, disability, or political affiliation or belief.³² Bangladesh must be vigilant to ward off threats to this unity and assaults upon it from those powerful forces who feel threatened by a strengthened civil society.³³ These forces exist in every society – a mutually supportive alliance of power and wealth, which is self-serving, sectarian, and willing to use any means to achieve its purposes.³⁴ There are abundant examples of how violence, discord, and division is promoted through inciting communal and ethnic conflict, thus undermining the development of democratic institutions.³⁵ Where these forces prevail, the phenomenon of the cartelisation and criminalisation of politics, and the consequent dis-empowerment of people and weakening of civil society become inevitable.³⁶

²⁷ Kamal Hossain, 'Role of Civil Society in Promoting Human Development and Building Democracy' (1st People's Summit, Pakistan, 2000) 15 <https://sappk.org/wp-content/uploads/publications/eng_publications/Peoples_Summit_Report_1.pdf> accessed 5 March 2023.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *ibid.*

³¹ Islam (n 21).

³² *ibid.*

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

Societies engaged in transition from an authoritarian to a democratic political order face formidable challenges.³⁷ The institutions, values, and mindsets which are the legacies of the past persist. Traditions of arbitrariness, secrecy, decision-making without inclusion, consultation and open debate, and the lack of accountability impede the building of democratic institutions.³⁸

The positive lessons to be learnt are for Bangladesh to remain steadfast in its commitment to the core human values of the Liberation War enshrined in the Constitution, to never compromise these values for short-term political or commercial advantage, or in response to narrow parochial, partisan, or communal loyalties. Indeed, even more substantial are the lessons to be learnt from those who are designing innovative constitutional provisions and participatory institutions which inspire and enable ordinary citizens, to be proactive in promoting and protecting human rights – their own and those of other women and men – and in the exercise of their rights as citizens.

The South African Constitution has several provisions which secure for members of civil society access to information, access to the courts to enforce fundamental rights, and access to the legislative process itself.³⁹ I recall the wise counsel given by President Nelson Mandela who visited Bangladesh to join in the silver jubilee celebration of its independence in March 1997. When sharing his own experience, he underscored the need to build national unity – cutting across party lines – in order to achieve national objectives and overcome difficulties.⁴⁰ In Bangladesh society today, as it faces the challenge of the future, the need for consensus on national priorities and objectives must be widely understood.

Sharing a reflection on constitutions is pertinent to conclude this chapter. Dr. Ambedkar, who was the architect of the Indian Constitution in a memorable statement after the promulgation of their Constitution had said:

We are going to enter into a life of contradictions. In politics we shall have equality, and in social and economic life we shall have inequality... We must remove these contradictions at the earliest possible time.⁴¹

In a more emotional vein while responding to the Government's argument for not making special provisions for minorities (including Dalits), he had said in the Rajya Sabha in 1953:

³⁷ Hossain, 'Role of Civil Society in Promoting Human Development and Building Democracy' (n 27) 16.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ Address by President Nelson Mandela at a banquet hosted by the President of Bangladesh (26 March 1997) <http://www.mandela.gov.za/mandela_speeches/1997/970326_bangladeshbanquet.htm> accessed 20 July 2022.

⁴¹ Asbah Farooqui, 'BR Ambedkar's three warnings on democracy and where India stands today' *DNA India* (14 April 2014) <<https://www.dnaindia.com/analysis/standpoint-br-ambedkar-s-three-warnings-on-democracy-and-where-india-stands-today-1976571>> accessed 20 July 2022.

[M]y friends tell me that I have made the Constitution. But I am quite prepared to say that I shall be the first person to burn it out... [I]f our people want to carry on, they must not forget that there are majorities and there are minorities, and they simply cannot ignore the minorities....⁴²

Sometimes many of us may have shared this sentiment, when we see provisions in constitutions which proclaim that all powers belong to the people, and guarantee fundamental rights, including equality before law and equal protection of law, reduced to mere paper pledges. The proper response is not to burn constitutions, but to make them into living realities. This is possible if citizens resolve to play a proactive role as members of a vibrant civil society so that the pledges – which ‘we the people’ (the opening words in the Constitution of Bangladesh) – had made to ourselves – may be truly fulfilled.

References

Books

- Hossain, K. 2013. *Bangladesh: Quest for Freedom and Justice*. Dhaka: University Press Ltd.
 Huda, A.K.M.S. 1997. *Constitution of Bangladesh Vol 1*. Dhaka: Rita Court.
 Islam, M. 2012. *Constitutional Law of Bangladesh*. Dhaka: Mullick Brothers.
 Soin, K. 1998. *The Empowerment of Women*. Singapore: Association of Women for Action and Research.

Internet Sources

- Hossain, K. 2000. *Role of Civil Society in Promoting Human Development and Building Democracy* (1st People’s Summit, Pakistan) https://sappk.org/wp-content/uploads/publications/eng_publications/Peoples_Summit_Report_1.pdf. Accessed 5 Mar 2023.
 Huq, A. F. 1973. Constitution-Making in Bangladesh. *Pacific Affairs*, 46(1) Online https://constitutionnet.org/sites/default/files/Huq%20Constitution-Making_Bangladesh%20.pdf. Accessed 11 Jan 2022.
 Islam, K. S. 2010. Interview with Dr Kamal Hossain: On Realising Our Constitutional Dreams. *The Daily Star* (Dhaka, November) <https://archive.thedailystar.net/forum/2010/November/dreams.htm>. Accessed 5 Mar 2023.
 Siddiqi, D. M. 2018. Secular Quests, National Others: Revisiting Bangladesh’s National Assembly Debates XLIX(II) *Asian Affairs* 238-258. doi:<https://doi.org/10.1080/03068374.2018.1470793>. Accessed 9 Jan 2022.

⁴²Anurag Bhaskar, ‘Ambedkar’s Constitution’: A Radical Phenomenon in Anti-Caste Discourse?’ (2021) 2(1) *CASTE: A Global Journal on Social Exclusion* 109, 116 <<https://journals.library.brandeis.edu/index.php/caste/article/view/282/63>> accessed 20 July 2022.

Kamal Hossain was the Chair of the Constitution Drafting Committee that drafted the Bangladesh Constitution in 1972. He is a Senior Advocate at the Bangladesh Supreme Court. He obtained an AB (Economics) degree from the University of Notre Dame, USA, and his BA in Jurisprudence, BCL, and DPhil from Oxford University. He taught constitutional law and international law at Queen's College, Oxford (1957–59) and Dhaka University (1962–67). He was a Research Student (1958–59, 1964) and Research Fellow (1977–79) of Nuffield College, Oxford, and Visiting Fellow (1976–77) of All Souls College, Oxford. Dr. Hossain was the Minister of Law (1972–73), Minister of Petroleum and Minerals (1973–75), and Minister of Foreign Affairs (1973–75) for the Bangladesh Government. He was a member of the UN Compensation Commission for two terms (1994–96 and 1999–05) and the Chairman of two of its Panels, and the UN Special Rapporteur on the Human Rights Situation in Afghanistan (1999–03). His major publications as an author include: *Law and Policy in Petroleum Development: Changing Relations between Transnationals and State* (Pinter, London/New York, 1979); and *Legal Aspects of the New International Economic Order* (Nichols, New York 1980), and as co-editor include *Permanent Sovereignty over Natural Resources in International Law* (Palgrave Macmillan, London, 1984).

Chapter 3

Constituent Assembly Debates on the Bangladesh Constitution: Intentions, Insight, and Implementation



Md Nazrul Islam

Abstract The Constituent Assembly of 1972 carried out a lively, informed, and in-depth debate on the objectives, principles, contents, and institutions of the Bangladesh Constitution. Among other things, the debate mostly centered on the design of the constitution regarding judicial enforceability of fundamental principles of state policy, desirability of imposing restrictions on the enjoyment of fundamental rights, independence of the judiciary, parliamentary sovereignty, and accountability of the executive. Although the 1972 Constitution is the outcome of this debate, it is impossible to unveil the underlying meaning of many of its provisions without making resort to this debate. The Constituent Assembly debate reflects important guidelines for appreciating the intentions, insights, and apprehensions of the framers of the Constitution and for chalking down the subsequent constitutional discourse. It thus merits special importance in the interpretation of constitutional and legal provisions as well as in taking measures for strengthening the constitutional architecture. This chapter examines the constituent assembly debate to outline those guidelines and articulates both constitutional development and deviation during the past 50 years. Finally, it identifies the areas which future constitutional discourse should evolve and contribute to strengthening the constitutional and democratic institutions in Bangladesh.

Keywords Constitution-making · Constituent assembly · Consultative process · Fundamental principles · Socialism · Economic rights · Democracy · Nationalism · Secularism

Md N. Islam (✉)

Department of Law, University of Dhaka, Dhaka, Bangladesh

e-mail: asifnazrul@gmail.com

3.1 Introduction

Constituent Assembly is one of those bodies which represents people of a country and is vested solely or mainly with the ‘constituent power’ of making a constitution for the country.¹ Depending on the process of representation, bodies with similar authority and functions may have different names such as constitutional convention, constitutional commission, or constitutional assembly.² The people of Bangladesh earned the long-awaited opportunity of framing their own constitution upon victory in its liberation war on 16 December 1971. A Constituent Assembly formed with the members of National and Provincial Assembly elected in 1970 was assigned with the responsibility of accomplishing this task.³

The Constituent Assembly (CA) of 1972 carried out lively, informed, and in-depth debates on the objectives, principles, contents, and institutions of the Bangladesh Constitution. It first declared the ‘fundamental principles’, formed a Constitution Drafting Committee (CDC) from among its members and then conducted three readings of the draft submitted by the CDC. The process was smooth and in the absence of strong opposition, the CA did not experience deadlock over any specific topic or need to make resort to any devices or techniques to address critical disagreement.⁴ The debates, among other things, focused mostly on the importance of judicial enforceability of fundamental principles of state policy,

¹ According to a study on this subject, the Constituent Assembly may be assigned with the task of preparing the first draft or have the final responsibility for passing it into law. In some cases, Parliament approves the constitution prepared by the Assembly and in a few cases, referendum may be required if the constitution is not made by a body elected by the people, Michele Brandt et al., *Constitution-making and Reform: Options for the Process* (Interpeace 2011) 232–36.

² The more common trend in Asia, Europe, and Latin America is to designate a ‘constituent assembly’ as a constitution-making body, although in recent years, constitutional reviews are done through ordinary legislatures in some European countries, *ibid.* 232.

³ The election was held in accordance with the Legal Framework Order (LFO), issued by the President and Chief Martial Administrator of Pakistan on 30 March 1970. As the preamble of LFO provides, the National Assembly was intended to be constituted for the purpose of making the Constitution of Pakistan in accordance with this Order. As articles 23 and 26 provide, the National Assembly, constituted under this Order, was expected to be the first legislature of the Federation for the full term only after the authentication of the constitution by the President and its entry into force.

⁴ These techniques generally include substantive trade-offs, incremental reform strategies and various forms of deferral and temporary arrangements such as sunset or sunrise clause and mandatory review. Sumit Bisarya and Thibaut Noel, ‘Constitutional Negotiations Dynamics: Deadlocks and Solutions’ *Constitution Brief* (IDEA 2021) 10–12 <<https://www.idea.int/sites/default/files/publications/constitutional-negotiations.pdf>> accessed 17 March 2022. Using India as a case study, Tarunabh Khaitan argues that inclusion of directives principles in the constitutions can be another useful tool for accommodation of ideological dissenters, T Khaitan, ‘Directive Principles and the Expressive Accommodation of Ideological Dissenters’ (2018) 16 *International Journal of Constitutional Law* 389. However, as we will see later in this study, in case of Bangladesh, such inclusion was not intended to accommodate dissenters; it was rather to set the governance goals of the country and to define the fundamental responsibilities of the government.

needs for excluding restrictions on enjoyment of fundamental rights, independence of the judiciary, parliamentary sovereignty, and accountability of the executive.

These debates led to the adoption of the 1972 Constitution of Bangladesh. It provides important details for appreciating the intents, insights, and emphasis of the framers of the Constitution as well as for analysing the quality of subsequent constitutional discourses. It, therefore, merits special importance in the interpretation of the 1972 Constitution and evaluation of the extent of conformity of later constitutional developments. In addition to this examination, this chapter analyses the CA debates to achieve two objectives. First, to identify the issues which future constitutional discourse should consider and second, to contribute to the thoughts for strengthening of the constitutional and democratic institutions of the country.

The following sections present an analysis of the CA debates in line with the basic objectives of this study. In so doing, priority is given to the deliberations made by the important CA members such as the leader of the House (Bangabandhu Sheikh Mujibur Rahman), Chair of the CDC (Dr Kamal Hossain), some members of the war-time government of Bangladesh (Syed Nazrul Islam, Tajuddin Ahmad, Kamaruzzaman, and Mansur Ali etc.) and few opposition members (Suranjit Sen Gupta and Manabendra Larma). Other CDC members basically echoed or emphasised the points made by the party leaders except on a few occasions which are duly noted.

3.2 Context and Consultations

The CA inherited two important constituent instruments: the Proclamation of Independence of Bangladesh (10 April 1971) through which it was constituted⁵ and the Provisional Constitution of Bangladesh Order (11 January 1972) in which a parliamentary democracy was described as the ‘manifest aspiration of the people of Bangladesh’.⁶ The President promulgated the Constituent Assembly of Bangladesh Order on 23 March 1972, vesting it with the authority of framing a constitution for Bangladesh.⁷

The CA debates were dominated by the members of Awami League (AL), which overwhelmingly won the 1970 election and led the country’s liberation war in 1971.⁸ Although Bangabandhu, the leader of the House, underscored the necessity

⁵The Proclamation of Independence, para 10.

⁶The Provisional Constitution of Bangladesh Order, preamble para 4.

⁷The Constituent Assembly of Bangladesh Order, art 7.

⁸The CA comprised of the Members of the National Assembly (169) and the Provincial Assembly (300). Total member of the CA, after expulsion, resignation, disqualifications, and death was 403, among which all but 3 were elected from Awami League. Among those 3, one was elected from National Awami Party (Suranjit Sengupta) and two were independent members; Abul Fazl Huq, ‘Constitution-Making in Bangladesh’ (1973) 46(1) *Pacific Affairs* 60. As the footnotes of the above study suggest, the author prepared this study based on newspaper reports of that time and

of considering the opinion of all for framing of a 'proper' constitution and called upon the Speaker to ensure the participation of all the parties, big or small, it did not make any significant impact at the end.⁹ Despite thoroughly debated, excepting in one case, the opposition amendment proposals did not make it to the final text of the Constitution.¹⁰

The CA commenced its session on 10 April 1972 and on the next day, formed a 34-member Constitution Drafting Committee (CDC) headed by the Law Minister Dr. Kamal Hossain to produce a draft constitution for its consideration.¹¹ The CDC convened 74 meetings from 17 April to 11 October and finalised the text of the Constitution Bill on 11 October 1972.¹² According to its first meeting resolution, general people and organisations were solicited to submit written proposal on constitutional issues by 8 May 1972. In response, the CDC received 98 memoranda which were 'duly considered'.¹³ Bangabandhu later stated that the CDC members had prepared the draft based on their work, thoughts, discussions, and study, as far as possible, on all the constitutions of the world.¹⁴

The CDC report made special mention of the pledges embodied in the preamble of the draft constitution which reads 'it shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation' and proclaimed that it had made groundbreaking provisions in the Constitution for fulfilling this pledge. It also underlined other significant areas the Constitution Bill covered which included protection of fundamental human rights, parliamentary form of democracy, importance of rule of law, separation of the judiciary and proper functioning of constitutional offices such as the election commission.¹⁵

Similar to the CA, the CDC was heavily dominated by AL members and was probably guided by its parliamentary party.¹⁶ Most of the provisions of the draft

interviews with some members of the CA; see also, S C Sen, 'The Constitution of Bangladesh and a Short Constitutional History' (1974) 7(3) *Law and Politics in Africa, Asia and Latin America* 257–73.

⁹ *Bangladesh Gonoparishader Bitorko* (Bangladesh Constituent Assembly Debates), 1972 (Governmental Records, Part I) 15. Suranjit Sen Gupta described himself as an opposition member, but the speaker, on demand from some of the MPs, refused recognition of any opposition party in the CA, *ibid.* 29.

¹⁰ *Bangladesh Gonoparishader Bitorko* (Bangladesh Constituent Assembly Debates) 1972 (Governmental Records, Part II) 588–89.

¹¹ All but one of the members of the committee belonged to Awami League which included 5 ministers of the AL government; see *Bangladesh Gonoparishader Bitorko* (n9) 24–26.

¹² As Larma claimed during the general discussion in the CA, this Report was originally scheduled to be completed by 10 June 1972; *Bangladesh Gonoparishader Bitorko* (n10) 288.

¹³ Constituent Assembly of Bangladesh, Report of the Constitution Drafting Committee, 1, para 2.

¹⁴ *Bangladesh Gonoparishader Bitorko* (n 10) 15.

¹⁵ Report of the Constituent Drafting Committee (n13) 2–3, para 9–11.

¹⁶ There were indications that most, if not all, of the things were previously discussed and agreed upon in the parliamentary party meeting of AL, see the statement of Bangabandhu in *Bangladesh Gonoparishader Bitorko* (n10) 21. Fazl provides that the AL Parliamentary Party, during its meeting between introduction of the Bill and its second reading, accepted 80 amendments proposed by its members and moved those in the CA during the second reading of the constitution, Huq (n8) 68.

constitution it prepared were adopted unanimously and a few by majority vote. Its report, however, recorded 6 notes of dissent. The dissenting opinions were mostly concerning the inadequacy or desirability of measures undertaken for establishing socialism (particularly in art 42 and 47), non-enforceability of fundamental principles including the economic rights, excessive restrictions on fundamental rights, vacation of seats in parliament in cases of expulsion from the affiliated political party (art 70). Among other things, one dissenting member urged to begin the preamble in the name of the Almighty *Allah* (God) and another asked for constitutional provision for special promotion of the scheduled class, tribal, and other backward classes of people.¹⁷ The issues debated in the CDC and the members represented there dominated the deliberations of the subsequent Constituent Assembly meetings.

Based on the draft constitution submitted by the CDC on 12 October 1972, the CA conducted the first reading of the draft from 19–30 October 1972.¹⁸ During the second reading from 31 October to 4 November, 163 amendments were proposed and 84 were accepted¹⁹ in which only one was from an opposition member Suranjit Sen Gupta.²⁰ Most of these amendments were linguistic or decorative. Substantive amendments were very few such as one requiring election of the technocrat ministers within 6 months (art 56) and the other for deleting provisions of vacating seats in parliament in cases of expulsion from affiliated political party (art 70). The final reading and adoption of the constitution was done on 4 November 1972.²¹

3.3 CA Debates on Fundamental Principles

The CA carried out extensive discussions on both the content and linguistic features of the Constitution. Some debates concerned theoretical and procedural issues such as the authority of the CA to frame the Constitution,²² whether the CA had conducted adequate consultation,²³ and whether it should also act as a parliament for the

¹⁷ Report of the Constitution Drafting Committee (n13) 8; for all the Notes of Dissent, 5–23.

¹⁸ Table of Contents, The CA Debates, *Bangladesh Gonoparishader Bitorko* (n10), In that reading, a general discussion was held in which 48 members out of 404 total members and 175 intended speakers were given the scope to discuss. Among them, 16 were members of the CDC, Fazl (n8) 68.

¹⁹ Fazl (n8) 69.

²⁰ It was for providing the members of parliament with the scopes of conducting discussion on the President's address in the Parliament, *Bangladesh Gonoparishader Bitorko* (n10) 588–89.

²¹ *ibid.* 687–709.

²² Suranjit Sen Gupta argued that the CA was intended to be constituted under the 1970 LFO to frame a constitution of Pakistan and the campaign of the 1970 election was only for substantial autonomy for East Pakistan, *Bangladesh Gonoparishader Bitorko* (n10) 236. Bangabandhu previously pointed out that as 98% of the people had casted their votes for AL, it had the authority to frame the constitution of Bangladesh, *ibid.* 19.

²³ Bangabandhu responded that the constitutional discussion went on throughout the decades-long struggle for liberation of the country; *Bangladesh Gonoparishader Bitorko* (n10) 19. Hafez

purpose of ordinary lawmaking.²⁴ These issues formed minor part in terms of volume, as the CA debates focused mostly on important provisions of the Constitution, in particular, the value of the fundamental principles of state policy and their contents.

Similar to some other countries, these principles (namely, nationalism, socialism, democracy, and secularism) laid the foundation of making of the Bangladesh constitution.²⁵ These were pronounced at the first day of the meeting of the CA by a top ruling party leader in order to guide subsequent deliberations on the details of the constitution.²⁶

The CA put heavy emphasis on the importance of these principles in two distinct ways. First, it took a unique approach of designating these principles also as *fundamental principles of the constitution* in the preamble of the draft constitution. It then elaborated the fundamental principles of state policy in the body of the Constitution. And second, these principles were described as the basis on which the liberation war was fought and on which the country would be run.²⁷ It was repeatedly asserted in the CA that the next elected government must take measures and make laws for the implementation of these principles.²⁸ When notice was drawn that fundamental policies of the previous constitutions were not implemented during the Pakistani regime, it was strongly argued including by Dr. Kamal Hossain that the Bangladesh legislature would be different in terms of actual representation of the people and therefore it could be trusted in taking measures for the implementation of the fundamental principles.²⁹

The debates put particular emphasis on the necessity of implementation of socialism and relevant provisions of the Constitution. It clarified that achieving the

Habibur Rahman of AL stated that public opinion for this constitution had evolved through the aspirations of the last 25 years and therefore it had grown like the constitution of England, *ibid.* 114.

²⁴ KM Obayedur Rahman, an AL MP proposed such extended role of the CA, *Bangladesh Gonoparishader Bitorko* (n9) 23. However, this issue was not discussed at all later. Theoretically, it may be better not to give law making authority to a CA, otherwise it may not have the same vested interest in producing the constitution, Brandt (n1) 235. However, this may provide the Head of the State with the sole authority of making law for the nation without adequate consultation. Thus, nearly 200 legislation were made in Bangladesh between January 1972 and April 1973 without involvement of Parliament. Justice Mustafa Kamal, *Bangladesh Constitution: Trends and Issues* (University of Dhaka, 2001) 6.

²⁵ On other countries' practice, see Bisarya and Noel (n 4) 5.

²⁶ Syed Nazrul Islam, the war-time Acting President of Bangladesh read an independence resolution which expressed allegiance to the Proclamation of Independence and, among other things, stated that, 'At this moment, this Assembly has taken the responsibility of framing an appropriate constitution on the basis of those ideals basing on which people of Bangladesh fought the liberation war namely nationalism, democracy, socialism and secularism' *Bangladesh Gonoparishader Bitorko* (n 9) 10. The Proclamation declared Bangladesh as a sovereign country established to ensure for its people equality, human dignity, and social justice. It may be argued that this declaration and the three goals were reflective of nationalism, democratic values, and socialism.

²⁷ See the comments of Bangabandhu, n10, 20. Syed Nazrul Islam, 128, and Kamal Hossain, 419.

²⁸ For example, Kamal Hossain, *ibid.* 419.

²⁹ *ibid.* 435–36.

goals of socialism is the top priority and laws would be made for ensuring people's economic rights and equal distribution of property, if necessary, by overriding fundamental rights such as right to private property. As summarised by one member, 'an in-depth analysis of the constitution as submitted in this CA reveals that the main goal of this country will be establishing socialism and that will be done through democracy. Nationalism and secularism will provide the strength for doing this. This is the aspiration of people'.³⁰

3.3.1 *Socialism and Economic Rights*

One of the major reasons for the liberation war was the disparity between the Eastern and Western province of Pakistan and state patronisation for the accumulation of wealth in the hands of a few powerful families of the West Pakistan.³¹ The CA debates show how seriously the constitutional provisions were thought out to establish socialism to prevent the occurrence of similar incidents in Bangladesh.³² As Bangabandhu proclaimed:

We believe in socialism where the society will be free from exploitation and without achieving this, 75 million people of Bangladesh could not survive in 54,000 square miles. That is why the economy will be socialist.³³

Socialism was defined in article 10 of the Constitution and CA debates underlined some of its core contents, notably an exploitation free society,³⁴ fair distribution of wealth accumulated by the efforts of all,³⁵ nationalisation and acquisition of private banks, industries, and companies to stop repression of the people,³⁶ and the implementation of economic rights including food, shelter, and education.³⁷

The CA debates identified provisions of socialism in articles 8, 10, 13, 15–17, 19–21, 42, and 47(1) and acknowledged that these provisions were drawn or inspired from socialist countries such as USSR, Yugoslavia, and GDR.³⁸ It had noted that

³⁰ Md Enayet Ali Sana, *ibid.* 484.

³¹ Nurul Islam, *Making of a Nation Bangladesh, An Economist's Tale* (University Press Ltd., Dhaka 2003) 23–77; Rehman Sobhan, *From Two Economies to Two Nations, My Journey to Bangladesh* (Daily Star Books, Dhaka 2005) 3–42.

³² Kamal Hossain, *Bangladesh: Quest for Freedom and Justice* (University Press Ltd., Dhaka 2013) 143.

³³ *Bangladesh Gonoparishader Bitorko*, (n10) 20. It was passionately asserted that the struggle for socialism and equal distribution of wealth started even before 1962 when AL took the programs for socialism; Syed Nazrul Islam, (n10) 118.

³⁴ Bangabandhu, *ibid.* 20.

³⁵ Kamal Hossain, *ibid.* 24.

³⁶ Bangabandhu, *ibid.* 701.

³⁷ Tajuddin, *ibid.* 393.

³⁸ Kamal Hossain, *ibid.* 440–42, Syed Nazrul Islam, *ibid.* 122, Tajuddin, *ibid.* 390–93, and Abu Md Subed Ali, *ibid.* 458.

article 8(2) had empowered Parliament for promulgation of enabling laws on areas and issues covered in the above articles and had also incorporated there a unique provision for the interpretation of the Constitution including in the light of the provisions on socialism.³⁹

The majority of CA members justified judicial non-enforceability of socialism particularly of economic rights and envisaged a gradual process for their implementation.⁴⁰ During the second reading, Suranjit Sengupta proposed to remove the clause of article 8(2) which declared the judicial non-enforceability of the fundamental principles.⁴¹ In response, Kamal Hossain argued ‘the judiciary cannot plan or allocate money or make the structural changes for ensuring economic rights; these are the responsibilities of the executive and the legislature’.⁴²

Kamal Hossain and others underscored the necessity of keeping faith in future parliament and the needs for growth of resource⁴³ partly in response to the demands such as fixing a time frame for the implementation of economic rights,⁴⁴ fixing ceiling of personal property and land ownership,⁴⁵ and salary,⁴⁶ and free and mandatory education up to class ten within a specific time.⁴⁷ As Kamal Hossain stated, ‘Adequate provisions for food, cloth, medical care and education are there in the constitution for making fundamental changes in the economic system to transform it to the directions of socialism’.⁴⁸

3.3.1.1 Relation of Socialism with Democracy

The CA noted that democracy would be the means of achieving the objectives of socialism. While explaining its reconciliation with democracy, Kamal Hossain stated that ‘the new government is aware of the new avenue of moving toward socialism through democratic procedure’.⁴⁹ He further explained that in order to ensure that the planned journey to socialism would not meet any obstacle, the Constitution had made special provisions in article 42 and 47 including for the protection of those laws which provide for nationalisation, acquisition of private property, land reform, even in cases of their inconsistency with the constitutional

³⁹ Tajuddin, *ibid.* 14, 385. This unique provision was absent in the Pakistan Constitution of 1956 and 1962 and in the Indian Constitution of 1950.

⁴⁰ *Bangladesh Gonoparishader Bitorko* (n10): Professor Md Yusuf Ali (Education Minister), *ibid.* 402, Bangabandhu, *ibid.* 701, and Asaduzzaman Khan, *ibid.* 269.

⁴¹ *ibid.* 454–56.

⁴² *ibid.* 436. This proposal of Suranjit Sengupta was defeated by voting, *ibid.* 454–56.

⁴³ Asaduzzaman Khan, *ibid.* 269.

⁴⁴ Khaja Ahmed, *ibid.* 161.

⁴⁵ Suranjit Sengupta, *ibid.* 238.

⁴⁶ Khaja Ahmed, *ibid.* 161.

⁴⁷ Suranjit Sen Gupta, *ibid.* 458.

⁴⁸ *ibid.* 43.

⁴⁹ *ibid.* 25.

right to property.⁵⁰ He also justified the protection of the enabling law in the first schedule⁵¹ and later insertion of a provision in article 42 in which it was stated that no law provided for the acquisition, nationalisation, or requisition of property could be challenged in any court on grounds of absence or inadequacy of compensation.⁵² Similar assertion was made by other CA members to underline the primacy of socialist objectives over right to property (art 47).⁵³

It could therefore be concluded that the CA viewed socialism in terms of social and economic justice and designated it as the prime objective of the new Constitution. It was convinced that the constitution had made adequate provisions for requiring the future government and legislature to take steps to achieve this objective.⁵⁴

3.3.2 *Democracy: Meaning and Institutions*

The CA debates took account of the bitter history of limited democracy in the name of basic democracy, undermining the verdict of election and running the country without people's representation during the Pakistan period while discussing the importance of democracy as one of the fundamental principles of state policy.⁵⁵

Democracy was defined there as rules by people's representative,⁵⁶ voting right of the people,⁵⁷ fair and impartial election,⁵⁸ absence of dictatorship or autocracy,⁵⁹ and smooth transition of power.⁶⁰ The leader of the House, Bangabandhu, put emphasis on exercising of people's right to vote and said that in response to a public demand, voter's age was lowered from 21 to 18 in the Constitution.⁶¹ The CA debates placed specific importance on genuine representation of the people to uphold democracy. For example, Tajuddin Ahmad proclaimed:

The quality of the constitution does not depend on nice language or beautiful words, it depends on whether its implementation is in the hands of genuine representatives of the

⁵⁰ *ibid.* 25, 426.

⁵¹ Kamal Hossain, *ibid.* 475.

⁵² *ibid.* 475, 527–28.

⁵³ *ibid.*, Tajuddin Ahmed, *ibid.* 384–86, 390, Mansur Ali, *ibid.* 153, and Syed Nazrul Islam, *ibid.* 122.

⁵⁴ Kamal Hossain, *ibid.* 141.

⁵⁵ On the state of democracy during Pakistan Period, see Moudud Ahmed, *Bangladesh: Constitutional Quest for Autonomy* (University Press Ltd., Dhaka 1991); AMA Muhi, *Bangladesh: Emergence of a Nation*, (University Press Ltd. Dhaka, 1992), Nurul Kabir, 2022, *Birth of Bangladesh, The Politics of History and the History of Politics*, Dhaka, Sanghati.

⁵⁶ Kamal Hossain, *Bangladesh Gonoparishader Bitorko* (n10) 435.

⁵⁷ Bangabandhu, *ibid.* 435.

⁵⁸ Mansur Ali, *ibid.* 147.

⁵⁹ Syed Nazrul Islam, *ibid.* 119.

⁶⁰ Bangabandhu, *ibid.* 21.

⁶¹ *ibid.* 704.

people and in that case it will not be misused. This constitution has made provisions for pure democracy; it has made provision so that people can fairly elect their representatives in right time without any interference.⁶²

The same emphasis on people's representation was reflected in acceptance of a proposal for the addition of a new clause (4) to article 56 for mandatory election of technocrat ministers within 6 months of their appointment and recognition of this provision as a democratic norm.⁶³

3.3.2.1 Independence of the Election Commission

The CA members underscored the significance of the independence of the Election Commission (EC) for conducting fair elections. The Provision for the separation of the EC and protecting its tenure was made in order to ensure that '*the election is conducted impartially and fairly and the EC can work without any fear and greed*' (emphasis added).⁶⁴ Suranjit Sen Gupta emphasised the necessity of appointing impartial persons in the EC and for that suggested that the election commissioners must be from the Judges of the Supreme Court (article 118).⁶⁵ Others disagreed arguing that qualified Judges for these posts may not be available all the time.⁶⁶ This debate reflected a belief that the Judges would be neutral in discharging their responsibilities.

Kamal Hossain, the CDC Chair, also explained the role of the election time government for ensuring free and fair election. As he pointed out, it should act as a 'caretaker government' and it could not take any fundamental policy decision during the 90 days of election.⁶⁷

3.3.2.2 Accountability of the Elected Government

The CA discussed about the accountability of the cabinet to elected Parliament. Citing example from France and Italy, Suranjit Sen Gupta asked for the addition of a provision to article 55 to ensure individual as well as collective accountability of the cabinet to Parliament.⁶⁸ Kamal Hossain replied that the state structure and form of government in those countries were different and that their provision for individual accountability should not be followed in Bangladesh.⁶⁹

⁶² *ibid.* 388–89.

⁶³ *ibid.* 549–50.

⁶⁴ Mansur Ali, *ibid.* 147 and Kamal Hossain, *ibid.* 617–18.

⁶⁵ *ibid.* 614.

⁶⁶ *ibid.* 614.

⁶⁷ *ibid.* 428–29, 559.

⁶⁸ *ibid.* 545.

⁶⁹ *ibid.* 547.

The CA questioned the desirability of the draft article 70 which provided for vacation of seat in Parliament in case of expulsion from the party. On a proposal from Nurul Haq, article 70 was amended according to which expulsion from the party was substituted with resignation from the party as a ground of losing membership from the Parliament.⁷⁰

3.3.2.3 No Provision for Black Laws

While explaining the democratic nature of the state, Kamal Hossain proclaimed that the Constitution of Bangladesh did not allow detention for an indefinite period or empower Parliament to make any repressive law and that it had no provision for declaring emergency although in last 20 years many new constitutions provided scopes for imposing emergency.⁷¹

It is evident from the above discussion that the CA aspired to establish a truly representative democracy in Bangladesh through fair election and required the elected government to uphold the spirit of democracy, including by being accountable to Parliament.

3.3.3 *Nationalism and Secularism*

The other two principles of state policy, nationalism and secularism, were less debated in the CA and less elaborated in the Constitution. Nationalism was reflected in only three articles, namely 9, 23, and 24) and secularism only in article 12.⁷²

3.3.3.1 Nationalism

The Bengali (or Bangalee) nationalism was defined as an identity derived from its language and culture. The CA debates noted that it was developed through various political movements (such as the 6 point-programme for autonomy, 11 points movement for self-rule, and the 1969 people's upsurge against the Pakistani military oligarchy) and had been protected in articles 23 and 24 of the constitution.⁷³ Manabendra Larma, the only ethnic minority representative in the CA, opposed an amendment that provides for 'Bangalee' nationalism in article 6 by arguing that, he was a

⁷⁰ *ibid.* 583–84.

⁷¹ *ibid.* 151.

⁷² On the contrary, as Kamal Hossain later pointed out, two aspects that engaged the greatest amount of attention in formulating the detailed provisions of the 1972 Constitution were parliamentary democracy and socialism through a democratic process. Kamal Hossain (n32)144.

⁷³ Mansur Ali, *Bangladesh Gonoparishader Bitorko* (n10) 146.

Chakma, an ethnic minority, not a Bengali.⁷⁴ The amendment was passed without entertaining his objection as the majority argument was that the ‘Bangalee’ nationalism was the central motivation of becoming an independent nation.⁷⁵ When Larma proposed to add a new article (article 14A) to protect the interest of the ethnic minorities, it was viewed as against Bengali Nationalism.⁷⁶

During the discussion on article 47, Larma again pleaded to add a new article namely, article 47A for making provision for autonomy of Chittagong Hill Tracts (an administrative district inhabited predominantly by indigenous/tribal people) for ensuring special protection of economic, social, and religious rights of the indigenous people. He claimed that the 1972 Constitution failed to protect their interest in the way it was done in earlier constitutions of the British and Pakistan period.⁷⁷ Kamal Hossain disagreed and claimed that the Bangladesh Constitution had given equal rights and, in addition, had incorporated special provision for the interests of tribal communities in articles 14, 28, and 29.⁷⁸ This suggests that the constitutional provisions of making laws for the advancement of backward sections in those articles were meant to protect, among others, the ethnic minorities.

3.3.3.2 Secularism

The CA debates record no difference of opinion on the acceptability of secularism as a fundamental state policy, although one CDC member (AK Musharaf Hossain Akond) previously insisted on reflecting the spirit of Islam, the predominant religion of the country, in the preamble to the constitution.⁷⁹ But during the CA debate, one senior member rather argued that the Holy *Quran* had supported equal rights of all religions 14 hundred years ago.⁸⁰

As the CA debates suggest, the bitter experience of politicisation of religion during the Pakistan regime was the reasons for designating secularism as a state ideal. It was claimed that AL took the ideals of secularism long ago when Awami Muslim League was transformed into Awami League,⁸¹ or when AL opted for joint election in 1954 (East Pakistan provincial election).⁸² The necessity of its inclusion as a fundamental principle was bolstered through the past incidents of exploitation, betrayal, murder, and repression in the name of religion during the Pakistani

⁷⁴ *ibid.* 452.

⁷⁵ For example, Osmani, *ibid.* 457–8 and Syed Nazrul Islam, *ibid.* 460.

⁷⁶ *ibid.* 466–67.

⁷⁷ *ibid.* 293.

⁷⁸ *ibid.* 295–98.

⁷⁹ Report of the CDC (n13) 8. A few more also objected to the inclusion of secularism; see Anisuzzaman, Bipula Prithibi [The Vast World], (Prothoma 2015), (n13) 34.

⁸⁰ Abdur Rashid Tarkabagish, *Bangladesh Gonoparishader Bitorko* (n10) 403–04.

⁸¹ Syed Nazrul, *ibid.* 702.

⁸² Mushtaque, *ibid.* 180.

Regime.⁸³ The CA members, therefore, spoke for eliminating the use of religion for political purpose and non-interference in others religion.⁸⁴ Syed Nazrul Islam rather argued that in implementing the spirit of the other three principles, secularism would serve as a catalyst.⁸⁵

Although secularism was defined only in article 12 and reflected only in article 41 on freedom of religion, it was also tacitly recognised in article 28(2). This article provides for equality of man and women only in public and state life and thereby allows equal protection of all the religion-based family laws on inheritance, marriage, and divorce issues. Two of the female members of CA however expressed their expectation that the future Parliament would make laws for equal right of property and equality in marriage and divorce issues following example from reforms in Turkey, Egypt, Tunisia, Morocco, Cyprus, Iran, and Iraq.⁸⁶

At the end of the above discussion on the four fundamental principles, one may suggest that the CA viewed these four principles as related to each other. As it appears, the CA considered socialism as the destination, democracy as the means, nationalism as the base, and secularism as the catalyst for realising the dreams of the liberated nation.

3.3.4 *Other Important Debates*

The CA debates touched upon many other issues. These include impunity provisions in fundamental rights (article 46), impeachment procedure of the President (article 52), duration of Parliament (article 72), vacation of the seats of the Speaker (article 74), dismissal provision of civil officers (article 135) and transitional provisions (article 150).⁸⁷

The following paragraphs analyse debates on selected issues significant for strengthening of democracy, rule of law and human rights of the citizens.

⁸³ Bangabandhu, 702, Fazlur Rahman, 306, and Syed Nazrul Islam, 128. See, in this regard, Dina M Siddiq, 'Secular Quests, National Others: Revising Bangladesh's Constituent Assembly Debates' (2018) XLIX(II) *Asian Affairs* 244–45.

⁸⁴ *Bangladesh Gonoparishader Bitorko* (n10), Bangabandhu 20, 702

⁸⁵ Syed Nazrul Islam, *ibid.* 127

⁸⁶ Badrunnesa Ahmed, *ibid.* 349 and Razia Banu, *ibid.* 359.

⁸⁷ The debates, however, did not discuss some important issues such as discharging of the President's function upon advice of the PM (art 48) and additional qualifications for appointments in the Supreme Court of Bangladesh (art 95).

3.3.4.1 Restrictions on the Enjoyment of Fundamental Rights

The debates centered around the necessity of allowing Parliament to impose restrictions on the exercise of fundamental rights upon grounds such as public order, public interests or interest of the state (articles 36–41). Suranjit Sen Gupta referred to the speech of *Bangabandhu*, delivered in the CA of Pakistan on 21 January 1956, where he strongly opposed such restrictions because of the ways these were exploited by the Pakistan government to suppress political opponents.⁸⁸ He and some others such as Larma and Abdul Aziz Chowdhury asked for absolute freedom rights. Abdul Aziz Chowdhury reminded that freedom rights are absolute in the US and warned that the restrictions could be misused to make black laws.⁸⁹ In reply, Asaduzzaman Khan explained that, the US Supreme Court opined that the states have the inherent power to impose such restrictions as are necessary to protect the common good, such as public health, safety, and morals and these restrictions also conform to the Universal Declaration of Human Rights.⁹⁰

Kamal Hossain argued that there was no constitution which did not allow legal and reasonable restriction on fundamental rights and gave examples from Czechoslovakia, Poland, GDR, Yugoslavia, and India. Citing examples also from Japan, Dr. Kamal Hossain informed the CA that the Supreme Court allowed imposing restriction on human rights even in cases of absence of such provisions in the constitution.⁹¹ When comments were made that during the Pakistan regime, repressive laws were made to curtail human rights by making use of the restriction provisions,⁹² Kamal Hossain argued that the situation was totally different at that time, implying that such measures would never be undertaken in independent Bangladesh. He also stressed that the intention was not to allow imposition of unreasonable restrictions and in such cases the court could intervene.⁹³

3.3.4.2 Separation of the Judiciary

Separation of the judiciary was evaluated as one important aspect of democracy and rule of law.⁹⁴ Kamal Hossain pointed out that provisions for separation is made in fundamental principles and also in articles 114 and 115 which had placed the subordinate judiciary under the control of the Supreme Court. He recalled: ‘We have seen in the past, how the executive exerted its influence on the Judiciary just because it was under the executive. At the time of Ayub, one district judge issued an

⁸⁸ *Bangladesh Gonoparishader Bitorko* (n10) 227, 512–15.

⁸⁹ *ibid.* 502.

⁹⁰ *ibid.* 272.

⁹¹ *ibid.* 420–24.

⁹² *ibid.*, Larma 510.

⁹³ *ibid.* 501.

⁹⁴ *ibid.*: Syed Nazrul Islam 121 and Ahsan Ullah 372.

injunction against the government; consequently, he was transferred to Sandip [a remote island]. In order to stop it, we have made provisions in 114 and 115'.⁹⁵ As regards the higher judiciary, it was noted that special provisions for appointment and removal were made to ensure that the judges would work without fear, greed and influence.⁹⁶

3.3.4.3 Prime Minister's Power

The CA conducted critical discussion on the Prime Minister's (PM) absolute power, although, in doing so, it was mostly focused on article 57 regarding the dissolution of Parliament. Suranjit Sen Gupta pointed out that one weak aspect of the Constitution was concentrating unnatural and unlimited power in the PM, which was similar to those of the president in 1962 constitution of Pakistan. He was particularly concerned with the provision that the President would dissolve Parliament if so advised by the PM.⁹⁷ When one AL MP argued that this provision was made to express confidence in Bangabandhu, Abdul Aziz Chowdhury warned that he might not be the leader of the majority always and if some power greedy person becomes the PM, he/she would have the scope of killing democracy by misuse of article 57.⁹⁸ But it was dismissed by pointing out that such provision was quite common in parliamentary democracy.⁹⁹

To summarise, the above CA debates suggest the following convictions: (a) no repressive laws would be made by using the restriction clauses to deny or weaken fundamental rights and the Court would intervene if any such thing occurs; (b) the judiciary would act independently. The government would not be allowed to have the authority to influence the functioning of the judiciary; and (c) the PM would not use constitutional powers to weaken or destroy the democratic principles, spirits, and expectations.

3.4 Decades of Experience

As the above discussion shows, the beginning of our constitutional discourse offered huge potentials. The 1972 Constitution had advance provisions such as secularism as a fundamental principle of state policy at a time when no other South Asian constitution had such provisions. It had provisions those were innovative (achieving socialism through democracy), ambitious (exploitation free society in article 14,

⁹⁵ *ibid.* 431–35.

⁹⁶ *ibid.*, Monsur Ali 147.

⁹⁷ *ibid.* 229–30, 691.

⁹⁸ *ibid.* 416.

⁹⁹ *ibid.*: Asaduzzaman 276 and Syed Nazrul Islam 121.

establishing the office of Ombudsman in article 77), efficient (art 44 on the right to enforcement of fundamental rights) and promising (article 8 requiring interpretation of the constitution and other laws in the light of the fundamental principles including socio-economic rights) -such provisions were absent in the majority of contemporary constitutions.¹⁰⁰ Further, the 1972 Constitution had essential provisions for establishing parliamentary democracy, ensuring separation of judiciary and requiring accountability of the executive.

The CA debate as discussed above, suggest that these provisions were required to be fully complied with and in addition, these were expected to be strengthened by subsequent legislative measures.

This, however, does not necessarily mean that the 1972 Constitution was perfect. It contained a few provisions inconsistent with the spirit of good governance and with contemporary constitutions. Examples include the concentration of too much power in the PM particularly in articles 48 and 55, and denial of free exercise of voting right in Parliament (art 70).¹⁰¹ The 1972 Constitution, however, made provisions for its amendment (article 142) which offered windows of opportunity for addressing its deficiencies or modifying it to reflect later developments.

Many constitutions in the world have progressed through their later amendments. Such amendments include provisions for the protection of human rights (first 10 amendments to the US Constitution, right to information (Belgium, Mexico, and Norway); the decentralisation of power and ensuring people's participation (73rd and 74th amendments to the Indian Constitution); enforceability of social and economic rights (the 1996 South African Constitution), and right to water in some countries such as Ecuador and Costa Rica.

3.4.1 *Regressive Amendments*

There are also examples of regression in some African and Latin American constitutions through later amendments, . These moves, as an expert observed, were driven mostly by authoritarian consolidation, rather than democratisation.¹⁰²

¹⁰⁰This is basically a reproduction of the observation made by this author in an analysis published in the Daily Star in 2021. This author wrote that piece, using his pen name. See, Asif Nazrul, '50 Years of Bangladesh Constitution: Intentions, Institutions and Implementations', Ther Daily Star, 3 July 2021, <<https://www.thedailystar.net/views/opinion/news/50-years-bangladesh-constitution-intentions-institutions-and-implementations-2122191>> accessed 3 July 2022.

¹⁰¹ For example, in India it is the Cabinet, not the Prime Minister, upon whose advice the President must act and s/he can request reconsideration of such advice by the Cabinet. In Pakistan floor crossing of Parliament member is prohibited only in voting in no-confidence motion and passing of the Budget; Asif Nazrul, 'Constitution: Assaults of Amendments' The Daily Star, Dhaka, 20th anniversary issue, 17 March 2011<<http://archive.thedailystar.net/suppliments/2011/anniversary/section2/pg7.htm>>accessed 17 March 2022.

¹⁰²Sumit Bisarya, 'A decade of constitution-building processes: some reflections from international experts' in Adem Abebe and others (eds), *Annual Review of Constitution-Building: 2019* (International Institute for Democracy and Electoral Assistance, 2020) 12.

In terms of a constitutional journey, Bangladesh appears to fall into the wrong category of countries. Despite its promising beginning and high hopes expressed in the CA debates, it has regressed on some accounts in the last 50 years. Out of the 18 amendments enacted so far, only a few, such as the first amendment (made to ensure justice for victims of international crimes), the 12th amendment (which reinstituted parliamentary democracy) and the addition of article 23A by 15th amendment (which provides for protection of unique culture and tradition of tribes, minor races, and ethnic communities) meet the expectations expressed in the CA debates on constitution-making. Other amendments were mostly self-serving efforts undermining the spirit of the CA debates and fundamental constitutional principles. For example, the 4th amendment was enacted to establish the one-party presidential system of government, while the 5th and 7th amendments were orchestrated to legalise unconstitutional martial law rules and regimes. These amendments betrayed the high ideals of democracy expressed in the CA. The 15th amendment repealing the provisions for non-party caretaker government without providing any credible alternative mechanism for conducting free and fair election goes against the emphasis that the CA put on the importance of genuine election and people's representation.¹⁰³

Among other amendments, the 8th amendment for insertion of Islam as a state religion defies the conviction the CA expressed on the necessity of eliminating state patronisation of any particular religion and the 2nd amendment for curtailing safeguards in cases of preventive detention and for insertion of emergency provisions goes against the commitment of the framers of the Bangladesh Constitution as expressed during the CA debates. Constitutional Amendments were made, among others, to repeal provisions of the 1972 Constitution requiring formation of Parliamentary Committees at the first meeting (art 76), election of technocrat ministers (art 56(4)), consultation with the Supreme Court for the appointment of the district judges (art 115) and control and discipline of the subordinate judiciary exclusively by the Supreme Court (art 116).

These amendments do not conform to the commitments expressed in the CA for promoting accountability of the executive, ensuring representative characters of the full cabinet, and strengthening the independence of the Judiciary.

3.4.1.1 Omissions

The 1972 Bangladesh Constitution has delegated to the Parliament the task of furthering its objectives by making laws on several important issues, including for empowering the subordinate courts to enforce fundamental rights (art 44), elaborating qualifications for the appointment of judges in the higher judiciary (art 95), strengthening of the parliamentary committees (art 76) establishing the office of ombudsman (art 77) and appointment in the election commission (art 118). Among

¹⁰³ Asif Nazrul, note 100.

these, only one legislation was made recently for appointment of the Election Commissioners, but that also was done allegedly without adequate consultation with the political stakeholders and civil society groups.¹⁰⁴

Bangladesh has particularly failed to take adequate step to realise the high ideals of socialism as expressed in the CA and instructed in various articles of the 1972 Constitution. Immediately after the brutal killing of Bangabandhu in August 1975, laws were made and policy steps were taken rather to frustrate socialism goals in various ways. This process continued in almost every regime. Recent examples include rampant privatization sometimes with impunity provisions,¹⁰⁵ encouraging unearned money and accumulation of wealth including by allowing whitening of black money,¹⁰⁶ and politicisation of institution of accountabilities such as the Anti-Corruption Commission.¹⁰⁷ Bangladesh has become known as one of the corrupt countries in Transparency International's studies,¹⁰⁸ income disparity here is among the top countries,¹⁰⁹ and the election process has become one of the most criticised.¹¹⁰ These regressions represent deviation from the high spirit of the liberation war as documented in the CA debates.¹¹¹

¹⁰⁴The 'Appointment of the Chief Election Commissioners and other Election Commissioners Bill – 2022' was passed in Parliament on 27 January 2022 <<https://www.thedailystar.net/news/bangladesh/elections/news/cec-and-ec-appointment-bill-2022-passed-parliament-2948441>> accessed 9 April 2022.

¹⁰⁵Nafiul Alam Supto, 'A law of power and energy impunity?' *New Age*, Dhaka, 25 August 2019 <<https://www.newagebd.net/article/82407/a-law-of-power-and-energy-impunity>> accessed 9 April 2022.

¹⁰⁶Transparency International Bangladesh (TIB) <<https://www.ti-bangladesh.org/beta3/index.php/en/media-release/3213-whitening-black-money-unconstitutional-immoral-discriminatory-corruption-friendly>> accessed 7 April 2022.

¹⁰⁷TIB, 'Weak national integrity system undermines governance, nourishes corruption' <<https://www.ti-bangladesh.org/beta3/index.php/en/activities/4243-information-3-column-2-nis-4>> accessed 7 April 2022. For full report on the weakness of National Integrity System of Bangladesh, see <https://www.ti-bangladesh.org/beta3/images/2014/fr_nis_NICSA_14_en.pdf> accessed 7 April 2022.

¹⁰⁸Bangladesh corruption perceptions index (rank), TIB Trading Economics <<https://tradingeconomics.com/bangladesh/corruption-rank>> accessed 4 April 2022.

¹⁰⁹Jahangir Hussain, 'Growing income inequality in Bangladesh causes concern' *Financial Express*, 2 August 2021 <<https://thefinancialexpress.com.bd/views/growing-income-inequality-in-bangladesh-causes-concern-1627918086>> accessed 4 April 2022.

¹¹⁰Bangladesh is still a 'hybrid regime' meaning substantial irregularities often prevent elections from being free and fair here, according to the *Democracy Index-2021* published by the UK-based Economist Group, see <<https://www.thedailystar.net/news/bangladesh/news/democracy-index-bangladesh-ranks-75th-2959801>> accessed 7 April 2022; also <<https://www.hrw.org/news/2019/01/02/bangladesh-election-abuses-need-independent-probe>> accessed 7 April 2022.

¹¹¹Census and Economic Information Center, 'Bangladesh Country Governance Indicators, 1996–2017' <<https://www.ceicdata.com/en/bangladesh/country-governance-indicators>> accessed 3 April 2022.

3.4.1.2 Failure to Reflect Contemporary Developments

Bangladesh has largely failed to reflect contemporary advances in various constitutional discourse of the world. Despite tremendous economic growth in last two decades, Bangladesh has not yet taken account of the necessity of ensuring judicial enforceability of economic rights such as right to food and water. Since the entry into force of the constitution of South Africa in 1996, a growing consensus has developed over the desirability of such judicial enforcement in many countries in Latin America and East Europe. There are genuine progresses as well; for example, right to education is now judicially enforceable in India and Pakistan, which is not the case in Bangladesh.¹¹² Except a few cases such as the addition of article 18A for the protection of environment and biodiversity, Bangladesh has ignored contemporary constitutional trend on establishing environmental rights such as right to clean water and on ensuring essentials of good governance such as objective appointment in the constitutional bodies.

In addition to parliamentary efforts, constitutional provisions may be advanced through their progressive interpretation by the Higher Judiciary. For example, the Supreme Court of India has taken such steps, not only for strengthening its independence, but also for the expansion of human rights and development of democratic institutions.¹¹³ In this respect as well, success of Bangladesh is limited. In constitutional cases, Bangladesh' Supreme Court appears to be keener on invalidating the former martial law regimes than on scrutinising attacks on the foundation of 1972 constitution during civil rule and on repairing those scars. In doing so, the Court sometimes arrived at decisions those lack sound reasoning.¹¹⁴

3.5 Concluding Remarks

It is generally agreed that a constitution should not be amended to destroy, dilute or weaken its foundation. Amendments should only be made if they aim at modifying and strengthening an existing constitution in order to reflect new circumstances and correct the deficiencies in the past and also to adapt to the needs of various times.

¹¹²In addition, art 29(3) of the Pakistan Constitution requires mandatory reporting of the measures taken for the implementation of economic rights, India constitution fixed the lowest wages of the workers, pregnancy leave, and special facilities for children. Legal aid is a fundamental principle in India and Pakistan; for detail, Nazrul (n100).

¹¹³O Chinnappa Reddy, 'The Court and the Constitution of India: Summit and Shallows, 2010' <<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198066286.001.0001/acprof-9780198066286>> accessed 7 April 2022; also <<https://www.legalserviceindia.com/legal/article-599-the-role-of-indian-judiciary-in-promoting-good-governance.html>> accessed 7 April 2022.

¹¹⁴For example, the 5th amendment judgment declared the legalisation of martial law regime by the 5th amendment as invalid, but at that same time it retained some of the provisions of martial law, including those that benefit the higher judiciary judges themselves, see Nazrul (n100).

Unfortunately, almost all the governments of Bangladesh have rather taken steps to weaken or misuse constitutional provisions on institutions such as the parliament, higher judiciary, election commission and cabinet for self-serving reasons. For example, they have strengthened their grip on the higher judiciary by exploiting the lack of constitutional provisions on appointment in the higher judiciary, elevation of High Court Division judges to the Appellate Division, and recruitment of the Chief Justice.

In spite of all the downsides narrated above, it may be argued that one may still find roots of optimism in the 1972 Constitution of Bangladesh. It was one of the best constitutions Bangladesh could have aspired in its immediate post-independence circumstances. It has survived 50 years of onslaught and its basic foundations, for example the high morals of the liberation war such as socialism and democracy, are still there. Moreover, the aspirations and resolve of the people to find ways for building a democratic, egalitarian and welfare state have kept on solidifying for years. In achieving those, the 1972 Constitution and the highly idealistic CA debates on this Constitution may continue to inspire, enlighten, and embolden the present and future generations of Bangladesh.¹¹⁵

In short, the high ideals of state building and the resolve to attain those are there in the 1972 Constitution. The faults had basically been in the frameworks for achieving those ideals which were further weakened by subsequent amendments. However, by undertaking constitutional reforms such as balancing the power between the president, prime minister and cabinet and strengthening parliamentary committees, judiciary, and election commission, it is possible to halt the process of erosion and reset the direction of the constitutional journey towards the true spirit of the 1972 Constituent Assembly of liberated Bangladesh.

References

Books

- Ahmed, Moudud. 1991. *Bangladesh: Constitutional Quest for Autonomy*. Dhaka: University Press Ltd.
- Asif Nazrul. 2022. *Songbidhan Bitorko 1972, Gonoporishoder Rastrabhabona, (Constitution Debates 1972, State Conceptualisation by the Constituent Assembly)*. Dhaka. Prothoma.
- Bisarya, Sumit, and Thibaut Noel. 2021. *Constitutional Negotiations Dynamics: Deadlocks and Solutions: Constitution Brief*. IDEA.
- Brandt, Michele, et al. 2011. *Constitution-Making and Reform: Options for the Process*. Geneva: Interpeace.
- Hossain, Kamal. 2013. *Bangladesh, Quest for Freedom and Justice*. Dhaka: University Press Ltd.

¹¹⁵ Asif Nazrul, Note 100. For details on this, see, Asif Nazrul, 2022, *Songbidhan Bitorko 1972, Gonoporishoder Rastrabhabona (Constitution Debates 1972, State Conceptualisation by the Constituent Assembly)*, Dhaka, Prothoma.

- Islam, Nurul. 2003. *Making of a Nation Bangladesh, An Economist's Tale*. Dhaka: University Press Ltd.
- M A Matin. 2019. *Unwritten Constitution of Bangladesh*. Dhaka. Mallick Bothers.
- Nurul Kabir. 2022. *Birth of Bangladesh, The Politics of History and the History of Politics*, Dhaka, Sanghati.
- Sobhan, Rehman. 2005. *From Two Economies to Two Nations, My Journey to Bangladesh*. Dhaka: Daily Star Books.

Chapters in Edited Books

- Bisarya, Sumit. 2020. A Decade of Constitution-Building Processes: Some Reflections from International Experts. In *Annual Review of Constitution-Building: 2019*, ed. Adem Abebe and others, 11–20. International Institute for Democracy and Electoral Assistance.

Articles

- Huq, Abul Fazl. 1973. Constitution-Making in Bangladesh. *Pacific Affairs* 46 (1): 59–76.
- Khaitan, T. 2018. Directive Principles and the Expressive Accommodation of Ideological Dissenters. *International Journal of Constitutional Law* 16 (2): 389–420.
- Sen, S C. 1974. The Constitution of Bangladesh and a Short Constitutional History. *Law and Politics in Africa, Asia and Latin America* 7 (3): 257–273.
- Siddiq, Dina M. 2018. Secular Quests, National Others: Revisiting Bangladesh's Constituent Assembly Debates. *Asian Affairs* XLIX (II): 244–245.

Legislations

- The Bangladesh Constituent Assembly Members (Cessation of Membership) Order, 1972.
- The Constituent Assembly of Bangladesh Order, 1972.
- The Legal Framework Order, 1970.
- The Proclamation of Independence, 1971.
- The Provisional Constitution of Bangladesh Order, 1972.

Documents

- Bangladesh Gonoparishad Bitorko* (Bangladesh Constituent Assembly Debates), 1972, Governmental records, Part I & II.
- Constituent Assembly of Bangladesh, Report of the Constitution Drafting Committee, 1972.

Internet Sources

- Census and Economic Information Center, *Bangladesh Country Governance Indicators, 1996–2017*. <https://www.ceicdata.com/en/bangladesh/country-governance-indicators>. Accessed 3 Apr 2022.
- Democracy Index-2021* published by the UK-based Economist Group. <https://www.thedailystar.net/news/bangladesh/news/democracy-index-bangladesh-ranks-75th-2959801>. Accessed 7 Apr 2022.
- Hussain, Jahangir. 2021. Growing Income Inequality in Bangladesh Causes Concern. *Financial Express*, August 2. <https://thefinancialexpress.com.bd/views/growing-income-inequality-in-bangladesh-causes-concern-1627918086>. Accessed 4 Apr 2022.
- National Integrity System of Bangladesh. https://www.ti-bangladesh.org/beta3/images/2014/fr_nis_NICSA_14_en.pdf. Accessed 7 Apr 2022.
- Nazrul, Asif. 2011. Constitution: Assaults of Amendments. *The Daily Star*, Dhaka, March 17. <http://archive.thedailystar.net/suppliments/2011/anniversary/section2/pg7.htm> Accessed 17 Mar 2022.
- . 2021. 50 Years of Bangladesh Constitution: Intentions, Institutions and Implementations. *The Daily Star*, July 3. <https://www.thedailystar.net/views/opinion/news/50-years-bangladesh-constitution-intentions-institutions-and-implementations-2122191>
- Supto, Nafiu Alam. 2019. A law of power and energy impunity? *New Age*, Dhaka, August 25. <https://www.newagebd.net/article/82407/a-law-of-power-and-energy-impunity>. Accessed 9 Apr 2022.
- The ‘Appointment of the Chief Election Commissioners and other Election Commissioners Bill – 2022’ was passed in Parliament on 27 January 2022. <https://www.thedailystar.net/news/bangladesh/elections/news/cec-and-ec-appointment-bill-2022-passed-parliament-2948441>. Accessed 9 Apr 2022.
- TIB, Bangladesh corruption perceptions index (rank), Trading Economics. <https://tradingeconomics.com/bangladesh/corruption-rank>. Accessed 4 Apr 2022.
- Transparency International Bangladesh (TIB), ‘Weak national integrity system undermines governance, nourishes corruption’. <https://www.ti-bangladesh.org/beta3/index.php/en/activities/4243-information-3-column-2-nis-4>. Accessed 7 Apr 2022.

Md Nazrul Islam (Asif Nazrul) is a Professor of Law at the University of Dhaka. He did PhD in international law from University of London in 1998 and worked as a fellow at the IUCN-Environmental Law Center in Germany in 2001 and later at the School of Oriental and African Studies in London in 2007. He has published research papers in leading international and national journals and wrote chapters in books published by the Routledge, Kluwer Academic Publishers and Brill. He also reviewed an academic book for Journal of Environmental Law published by Oxford University Press. He has presented academic papers in conferences convened in various countries in West Europe, US and South Asia and worked as a resource person in the environmental law teaching program jointly arranged by IUCN Academy of Environmental Law and Asian Development Bank. He has worked as a Consultant to European Union Delegation, Asian Development Bank and UN Development Program and is involved with International Law Association and South Asian for Human Rights (SAHR), among other reputed think-tank organisations. He was an elected bureau member of the SAHR from 2013–2017.

Chapter 4

Secularism as a State Policy, State Religion, and Minority Rights in the Constitution: Benign or Malign for Communal Harmony in Bangladesh?



Mohammad Golam Sarwar

Abstract The emergence of Bangladesh as the People's Republic underscores its secular character. Secularism, along with nationalism, democracy, and socialism, was given the status of high ideals of the Constitution and was adopted as one of the fundamental principles of state policy. However, the biography of secularism has witnessed a troubled journey over the years. This chapter traces the unpleasant journey of secularism starting from its original position in the first constitution to the present-day. The removal of secularism from the constitution and insertion of religious expressions, along with the declaration of state religion, has arguably destroyed the secular fabric of the constitution. While addressing such dichotomy, this chapter makes a compatibility test of the concurrent position of state religion and secularism in the constitution and assesses the implications of such position in relation to the rights of religious minorities. It argues that the changing paradigm of secularism in Bangladesh, being different from its original understanding, indicates a trend of the use of religion for political purposes that marginalises minority rights.

Keywords Secularism · State policy · State religion · Minority rights · Religious domination · Communal harmony

4.1 Introduction

Secularism was regarded as a driving force in the liberation struggle which inspired our freedom-loving people to fight against injustice, bigotry, communalism, and undemocratic practices. It was this struggle that ultimately led to the independence of Bangladesh. Secularism as an element of the inherent spirit of Bengali nationalism

M. G. Sarwar (✉)

Department of Law, University of Dhaka, Dhaka, Bangladesh

e-mail: sarwar.law@du.ac.bd

was the dominant narrative during the formulation of the constitution.¹ The first constitution of Bangladesh 1972 recognised the spirit of the liberation movement and incorporated secularism as a fundamental principle of the state policy. The concept of secularism along with its in-depth understanding was propounded by the father of the nation Bangabandhu Sheikh Mujibur Rahman. His understanding of secularism deserves significance because of his pioneer role in both the establishment of Bangladesh and adoption of the constitution in the newly born country.

Secularism was understood by Bangabandhu not as hostility to any religion rather inclusive of all religious practices.² While making a clear objection to the political use of religion, Bangabandhu's understanding of secularism did not undermine religious freedom which is guaranteed by the constitution. However, with paradigm shifts over the years in the political climate, secularism, after some ups and downs, has been restored in the constitution, albeit in a compromised version. The simultaneous recognition of Islam as the state religion and secularism as the state policy has been criticised due to its vague and contradictory nature, which, arguably, compromises the secular character of the constitution and the state.

The incompatibility of secularism and state religion leaves room to manipulate minority rights and threatens the future of communal harmony in Bangladesh. This chapter, while addressing such incompatibility also discusses some propositions that favour the concurrent presence of state religion and secularism in the constitution. It submits that the constitutional mandate of secularism as a state policy cannot be achieved in the presence of contradictory provision on state religion that not only invites criticisms and debates but also reflects a fragile commitment of the state towards minority rights and communal harmony, underscoring the need for reform.

4.2 The Meaning of Secularism in Bangladesh

The term 'secularism' refers to religious neutrality while indicating respect and tolerance for all religions.³ Secularism denotes religious freedom and tolerance and respect for ideas of rationalism, materialism, and humanism.⁴ In relation to state and religion, secularism has two aspects. While passive secularism indicates a pragmatic political principle which attempts to maintain state neutrality towards various religions, assertive secularism reflects a comprehensive doctrine aiming to eliminate

¹Ali Riaz, 'More Than Meets the Eye: The Narratives of Secularism and Islam in Bangladesh' (2018) 49(2) *Asian Affairs* 301–18.

²Rounaq Jahan, 'Bangabandhu's Vision of Secularism for Bangladesh' (2021) 69th Foundation Day and Lecture at *Asiatic Society of Bangladesh* 13.

³Riaz (n1), 303.

⁴S M Masum Billah, 'Can Secularism and State Religion Go Together?' (2014) 15 *ELCOP Yearbook on Human Rights* 38.

religion from the public sphere.⁵ In the west, secularism indicates a balanced position that allows the practices of all religions and ‘no religion’ peacefully.⁶

Bangabandhu Sheikh Mujibur Rahman was guided by the high ideal of secularism throughout his entire political life⁷ which was reflected in all pre-independence movements that finally culminated in the liberation war of Bangladesh. The secular standing of Bangabandhu contributed to shaping the course of history and politics of Bangladesh in both pre-independence and post-independence period.⁸ As per Bangabandhu,

[S]ecularism does not mean absence of religion. You are a Mussalman, you perform your religious rites. The Hindus, the Christians, the Buddhists all will freely perform their religious rites. There is no irreligiousness on the soil of Bangladesh but there is secularism.⁹

The principle of secularism has been perceived to oppose religious hegemony, religious tyranny and religion-based exclusion.¹⁰

In the context of Bangladesh, secularism is understood to be the opposite of communalism which begets communal politics and religious abuses. Bangabandhu asserted that ‘no communal politics will be allowed in the country’.¹¹ He warned,

One who loves man can never be a communalist. Those of you who are Muslims must remember that Allah is Rabbul Alamin (lord of mankind), not Rabbul Muslimin (lord of the Muslims)... Be aware of those who want to sow the seeds of communalism in the soil of Bangladesh’.¹²

While opposing communal politics, Bangabandhu also disregarded the misinterpretation of religion and its abuses for gaining political interests.¹³ Bangabandhu envisioned communal harmony and asserted for the prevention of Hindu-Muslim communal violence through the use of religion as an instrument of politics.¹⁴ He strongly criticised the use of communal violence as a ‘divide and rule strategy’ of the ruling classes that facilitated them to prolong their oppressive practices.¹⁵

Nobel Laureate Amartya Sen explained Bangabandhu’s exposition on secularism by underscoring that ‘secularism did not mean that people should not have religious freedom, which is an important kind of freedom that people with religious

⁵ Ahmed T Kuru, ‘Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies towards Religion’ (2007) 59(4) *World Politics* 568.

⁶ Md Saidul Islam ‘Minority Islam in Muslim Majority Bangladesh: The Violent Road to a New Brand of Secularism’ (2011) 31(1) *Journal of Muslim Minority Affairs* 125–141.

⁷ Jahan (n 2) 1.

⁸ Md Sikandar Ali, ‘The Legacy of Bangabandhu’s Secular Political Ideals’ (2020) 6(4) *International Journal of Advance Research and Innovative Ideas in Education* 353.

⁹ Billah (n 4) 46.

¹⁰ Rajeev Bhargava and Ashok Acharya (eds), *Political Theory: An Introduction* (Pearson Education 2008) 275.

¹¹ Billah (n 4) 46.

¹² *ibid.* 46.

¹³ Jahan (n 2) 4.

¹⁴ *ibid.* 5.

¹⁵ *ibid.* 8.

convictions would surely tend to value'.¹⁶ Sen emphasised on the association between secularism and human freedom propounded by Sheikh Mujib.¹⁷ Bangabandhu perceived secularism in the light of advancing human freedom and religious freedom while negating political use or exploitation of religion.¹⁸

The First Five-Year Plan (1973–1978) of the government highlighted the firm position of the people of Bangladesh on secular belief while dismissing the presence of any communal forces from the political arena.¹⁹ The plan reiterated the role of secular-spirited freedom loving people in the liberation war who had demonstrated their ability to defeat religious bigotry and caste and creed differences.²⁰

In *Bangladesh Italian Marble Works Limited v Government of Bangladesh and Others*, the High Court Division (HCD) of the Supreme Court of Bangladesh in 2005 observed that:

Secularism means both religious tolerance as well as religious freedom. It envisages equal treatment to all irrespective of caste, creed or religion but the State must not show any form of tilt or leaning towards any particular religion either directly or even remotely. It requires maintenance of strict neutrality on the part of the State in the matters of different religions professed by various communities in the State. The State must not [be] seen to be favouring any particular religion, rather, ensure protection to the followers of all faiths without any discrimination including even to an atheist. This is what it means by the principle of secularism.²¹

The observation of the court also echoed Bangabandhu's understanding of secularism which started to manifest from the very emergence of Bangladesh as a state. The proclamation of independence. Which is also considered as the first interim constitution of Bangladesh, declared that Bangladesh would be a people's republic and underscored the secular character of a new state. The 1972 constitution of Bangladesh, being guided and pioneered by Bangabandhu, adopted secularism along with nationalism, democracy, and socialism as the four fundamental principles of the state, and also outlined the means and methods of realising the principle of secularism in newly born Bangladesh. Such comprehensive adoption of secularism as a fundamental principle as well as its incorporation in various articles of the constitution reflects the utmost commitment of the country towards establishing a secular state which also made the country a pioneer in South Asia.²²

¹⁶Amartya Sen, 'Bangabandhu and Visions of Bangladesh' (2021) <<https://blogs.lse.ac.uk/south-asia/2021/03/07/bangabandhu-and-visions-of-bangladesh/>> accessed 20 January 2022.

¹⁷ibid. 2.

¹⁸ibid. 3.

¹⁹Jahid Hossain Bhuiyan, 'Secularism in the Constitution of Bangladesh' (2017) 49(2) *The Journal of Legal Pluralism and Unofficial Law* 207.

²⁰ibid. 207.

²¹62 DLR (2010) 70 at 197.

²²Jahan (n 2) 14.

4.3 The Context and Journey of Secularism

The emergence of Bangladesh as a nation state carries a long tradition of living in communal peace and harmony.²³ Unlike West Pakistan, the people of East Pakistan (now Bangladesh) have always upheld the values of ethnic culture, language and religious beliefs without creating any distinction and disparity.²⁴ In 1971, the people of Bangladesh fought back against denial, deprivation and violation of human rights committed by the Pakistani rulers who had used religion as a tool of politics and exploitation. The West Pakistan regime exploited the religious sentiments of the people of Bangladesh and invoked religion to justify the genocidal crackdown on the Bengali people of then East Pakistan.²⁵ With the emergence of Bangladesh, the high ideals of nationalism, secularism, democracy, and socialism gained momentum and disregarded all sorts of religious bigotry and communalism.

While keeping in mind the bitter experience of communalism and abuse of religion during the Pakistan era, the Bengali people of East Pakistan distanced themselves from the Pakistani version of politicised religion and steadily drifted towards secularism as an alternative to pursue their religious faith free from abusive and exploitative practices. In response to this popular view of religion, the framers of the constitution of Bangladesh incorporated 'secularism' as one of the guiding principles of the constitution. They not only reflected the high ideals for which the liberation war was fought but also highlighted the renunciation of abuse of religion for political purposes and the elimination of discrimination on the ground of religion.²⁶

The preamble being the polestar of the constitution pledges that 'the high ideals of nationalism, socialism, democracy and secularism, which inspired our heroic people to dedicate themselves to, and our brave martyrs to sacrifice their lives in, the national liberation struggle, shall be the fundamental principles of the Constitution'. Article 8 of the constitution reiterates the four principles of nationalism, socialism, democracy and secularism while terming them as the fundamental principles of state policy. The principles shall act as a guide in the making of laws and interpreting the constitution and other laws of the country as well as form the basis of the governance of the country.

For the realisation of the principle of secularism, article 12 of the 1972 constitution refers to the elimination of (a) communalism in all its forms; (b) the granting by the state of political status in favour of any religion; (c) the abuse of religion for political purposes; and (d) any discrimination against, or persecution of, persons practicing a particular religion. Article 41 of the constitution, while defining the scope of freedom of religion, adds value to the understanding of secularism. The article refers that (a) every citizen has the right to profess, practice or propagate any

²³ Shah Alam, 'The State-Religion Amendment to the Constitution of Bangladesh: A Critique, Law and Politics in Africa, Asia and Latin America' (1991) 24(22) *Quartal* 209–25.

²⁴ *ibid.* 214.

²⁵ *ibid.* 213.

²⁶ Billah (n 4) 46.

religion; and (b) every religious community or denomination has the right to establish, maintain, and manage its religious institutions. In addition, article 38 guarantees right to form associations or unions subject to any reasonable restrictions imposed by law in the interests of morality or public order. Most importantly, the article prohibits the formation of association which (i) destroys the religious, social, and communal harmony among the citizens, (ii) creates discrimination among the citizens on the ground of religion...; and (iii) organise terrorist acts or militant activities against the state or the citizens or any other country.

If articles 12, 38 and 41 are read together, it offers a broader meaning of secularism maintaining neutrality among all religions and prohibiting discrimination based on religion. The constitutional right to propagate religion has been made a qualified right instead of an absolute right wherein the constitution allows the state to regulate the activities of religious groups considering the parameters of public order, morality and safety.²⁷ However, article 41(2) provides an absolute guarantee by referring that no person in an educational institution shall be required to receive religious instruction or to take part in or attend any religious ceremony or worship other than those of his own religion.²⁸

4.4 The Deviation: Removal of Secularism from the Constitution

After the assassination of Bangabandhu Sheikh Mujibur Rahman, a dark chapter in the history of Bangladesh opened its pages in 1975. The military rulers led to the end of secularism; the core ideal of the father of the nation as well as the fundamental principle of the Bangladesh nation state. With such move, the then military rulers, started a state-sponsored Islamization process in Bangladesh following the footprints of Pakistani rulers.²⁹ The Islamization process left serious impacts on Bangladeshi society and culture.³⁰

Following the brutal assassination of Bangabandhu and capture of the governmental power in a military coup in mid-August 1975, the military regime replaced the fundamental principle of 'secularism' with 'Absolute Trust and Faith in the Almighty Allah' and added '*Bismillah-Ar-Rahman—ArRahim*' (in the name of Allah, the Beneficent, the Merciful) in the preamble to the constitution under the Proclamations (Amendment) Order, 1977.³¹ The insertion of 'absolute trust and faith in the Almighty Allah' while removing secularism left an impression indicating

²⁷ Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, Dhaka 2012) 376.

²⁸ *ibid.*, 376.

²⁹ Abdul Wohab, "'Secularism' or 'no-secularism'? A complex case of Bangladesh' (2021) 7(1) *Cogent Social Sciences* 1.

³⁰ *Ibid* 6.

³¹ The Bangladesh Gazette Extraordinary of 23 April 1977.

the biased position of the constitution towards a particular religion.³² Such constitutional position would facilitate Islam to become a dominating force while exerting pressure on the basic structure of the constitution.³³

The proviso³⁴ to article 38 that prohibits the formation of association destroying communal harmony was deleted by the military ruler through the Second Proclamation Order III of 1976.³⁵ Such deletion was ratified by the *Constitution (Fifth Amendment) Act 1979*. With such repeal, the religion-based political parties had been allowed to participate in politics disregarding the secular vision of the country. It is noted that after independence, Bangabandhu banned religion-based politics because of the controversial role and support to the Pakistani army by the *Jamaat-e-Islami* during the liberation war abusing the name of religion.³⁶ The foreign relations with Muslim countries based on Islamic solidarity were also introduced through article 25(2), which states 'The State shall endeavour to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity'.

The successive military regimes from 1975 to 1990 took various initiatives and measures to bring Islam into political discourse and public life while giving legitimacy to the activities of the Islamists both constitutionally and politically. Even the betrayers of the liberation war were rewarded and mainstreamed.³⁷ Such state sponsored islamisation was further strengthened by the immediate successor of the military rule, General Ershad who declared Islam as the state religion in 1988 through the 8th Amendment of the constitution. The amended article reads as follows: 'The state religion of the Republic is Islam, but other religions may be practiced in peace and harmony in the Republic'.³⁸

The amendment was a naked political ploy to use Islam as a tool to gain public sympathy while legitimising the activities of the autocratic regime of Ershad.³⁹ The superimposition of Islam as the state religion destroyed the secular character and democratic values of the constitution.⁴⁰ The constitution is mandated to build 'a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens'.⁴¹ The declaration of Islam as the state religion is considered as a violation of rights of the

³² Meghna Guhathakurta, 'Amidst the winds of change: The Hindu minority in Bangladesh' (2012) 3(2) *South Asian History and Culture* 288–301.

³³ *ibid.* 223.

³⁴ No person shall have the right to form or be a member or otherwise take part in the activities of, any communal or other association or union which in the name or on the basis of any religion has for its object, or pursues, a political purpose.

³⁵ Billah (n 4) 35.

³⁶ Guhathakurta (n 32) 291.

³⁷ *ibid.* 291.

³⁸ Art 2A of the Constitution of Bangladesh.

³⁹ Guhathakurta (n 32) 291.

⁴⁰ Alam (n 22) 223.

⁴¹ Paragraph 3 of the Preamble of the Constitution of Bangladesh 1972.

non-Muslims who do not belong to the Islamic belief.⁴² Such declaration is contradictory to the law of equality of all citizens and also inconsistent with the legal provisions of the constitution that guarantee rule of law.⁴³

4.5 The Revival of Secularism

In 2005, the High Court Division of the Supreme Court in *Bangladesh Italian Marble Works Limited v Government of Bangladesh and others*⁴⁴ declared the Fifth Amendment illegal and unconstitutional and emphasised on the revival of secularism as one of the fundamental principles of the constitution. In the landmark judgment, the court observed that the state 'is to ensure that no discrimination is made between the followers of one religion over the other' and 'is to ensure that all persons in the Country can perform their respective religious functions'.⁴⁵ The Court highlighted that the removal of secularism from the constitution through the 5th amendment undermined the basic character of the Bangladesh constitution.⁴⁶ While underscoring the significance of secularism in relation to the birth of Bangladesh, the court reiterated that the liberation war through which Bangladesh secured independence was based on four ideals including nationalism, socialism, democracy, and secularism.⁴⁷ The HCD also noted that Bangladesh was born to be a secular country and any deviation from such standing would contradict the basic structure of the constitution.⁴⁸ The Appellate Division (AD) of the Supreme Court of Bangladesh upheld the decision of the HCD and provided detailed judgment while declaring the 5th amendment illegal. It is noted that the *Constitution (Fifth Amendment) Act* having been declared void also invalidated the Second Proclamation Order No III of 1976, which ultimately restored the original proviso to article 38.

Following the judgment of the Supreme Court, the parliament passed the *Fifteenth Constitutional Amendment Act 2011*. The amendment restored the principle of secularism in the preamble (as high ideals), article 8 (as fundamental principle of state policy) as well as article 12 (substance of secularism) of the constitution. The amendment also reformulated the proviso to article 38 with some modifications.⁴⁹ However, Islam was retained as state religion and the

⁴² Alam (n 23) 223.

⁴³ *ibid.* 224.

⁴⁴ (2010) 62 DLR (HCD) 70.

⁴⁵ *ibid.* 194.

⁴⁶ *ibid.* 226.

⁴⁷ *ibid.* 115.

⁴⁸ *ibid.* 154.

⁴⁹ Provided that no person shall have the right to form, or be a member of the said association or union, if-
(a) it is formed for the purposes of destroying the religious, social and communal harmony among the citizens;

concerned provision (article 2A) has been amended which now reads as follows: ‘The State religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions’. Seemingly, the 15th amendment and amended article 2A have attempted to rise two suns across the same sky.

4.6 Concurrent Position of State Religion and Secularism: Complementary or Contradictory?

Over the years, the concurrent position of state religion and secularism in the constitution has witnessed diverse responses. There are some propositions favoring the simultaneous presence of secularism along with the provision of state religion in the constitution. Such proposition indicates the fact that while parliament reinstated secularism by repealing a martial law promulgated by a military ruler, it retained the provision of state religion adopted by another military ruler considering the social reality prevalent in the context of Bangladesh.⁵⁰

Notably, the Bangladeshi society has held religion in high esteem which has reflection in both public and private life.⁵¹ Religion always has influence in shaping people’s acceptance and obedience necessary to ensure a stable legal and social order. The use of religion became more prevalent when the process of islamisation started immediately after the assassination of Bangabandhu. Such political use of religion has contributed to shaping the popular belief system in a way where it was difficult for successive governments to adopt a new provision or amend the existing provision of the constitution without addressing the predominant religion and belief system.⁵² The reasons why the incumbent governments have retained state religion along with secularism are that they want (i) to retain the political support of the majority Muslim people; and (ii) to use the religious ideals as political tools while aiming to avoid any form of religious uprising.⁵³ It has been argued that the practices of Islamic ideals are embedded into the lives of the people of Bangladesh in such a

-
- (b) it is formed for the purposes of creating discrimination among the citizens, on the ground of religion, race, caste, sex, place of birth or language;
 - (c) it is formed for the purposes of organizing terrorist acts or militant activities against the State or the citizens or any other country; and
 - (d) its formation and objects are inconsistent with the Constitution.

⁵⁰ M Rahman, ‘The Compatibility of State Religion and Constitutional Secularism Coexistence: Bangladesh in Context’ (2020) 24(1) *Cambridge Open Engage* 6.

⁵¹ *ibid.* 6.

⁵² *ibid.* 7.

⁵³ *ibid.* 7.

way that the removal of Islam from the constitutional structure will leave unavoidable implications and effect.⁵⁴

Another harmonious interpretation regarding the presence of secularism along with secularism lies in the fact that though Islam has been placed as the state religion, the existence of other religions have been referred under the same marginal note of 'state religion'.⁵⁵ The constitutional provision reflects a principle of neutrality while giving equal status to all religions and thus disregarding any possibility of giving primacy to a particular religion.⁵⁶ It has been argued that the remodeled 'state religion' clause in the constitution does not contradict with its secular fabric rather it is portrayed as a mere constitutional courtesy which is mostly symbolic in nature.⁵⁷ Furthermore, the state religion provision article 2A is neither a part of preamble nor of the fundamental principle of state policy and for such standing, the interpretative value of the provision should not be equated to the Preamble which is the guiding star and touchstone of the constitution.⁵⁸ Thus the ceremonial recognition of state religion cannot impose any overarching effect over the principle of secularism.⁵⁹ Moreover, the state religion clause does not restrain parliament from striking down a religious law which is inconsistent with the constitution on the basis of constitutional supremacy stipulated under article 7(2).⁶⁰

However, the aforesaid arguments favoring the compatibility of state religion and secularism are not well-tested and suffer from criticisms. The incompatibility of the state religion with secularism under the present constitution has been widely discussed in various literature and resources. Mahmudul Islam argues that 'Islam being given the status of State religion, the consequent inconsistency is not removed by saying that the State shall ensure equal status and equal rights in the practice of other religions'.⁶¹ The imposition of state religion to a particular religion is considered contradictory with the mandate of article 12 of the constitution. The plain reading of article 12 implies that to realise the principle of secularism, the state shall eliminate the granting of political status in favour of any religion. While eliminating the abuse of religion for political purposes, the same article adopted the notion of separation of religion and state and indicated the non-interference of the state in religious matters.⁶² It is argued that the incorporation of any provision giving special status to a particular religion is inconsistent with *Bengali* nationalism which

⁵⁴ Ahmed Shafiqul Huque and Muhammad Yeahia Akhter, 'The Ubiquity of Islam: Religion and Society in Bangladesh' (1987) 60(2) *Public Affairs* 225.

⁵⁵ Billah (n 4) 44.

⁵⁶ Rahman (n 50) 8.

⁵⁷ Billah (n 4) 44.

⁵⁸ *ibid.* 45.

⁵⁹ Rahman (n 50) 10.

⁶⁰ Billah (n 4) 44.

⁶¹ Islam (n 27) 68.

⁶² Rahman (n 50) 16.

played pivotal role in the liberation war and later adopted as one of the core ideals of the Bangladesh state.⁶³

The *Bengali* nationalism, as per constitution, derived its uniqueness from culture, language, and the experience of abusive practice of religion in Pakistan, not from any particular religious values and practices.⁶⁴ It was this *Bengali* nationalism that formed the very basis of the liberation war for which the *Bangalees* irrespective of their religions made supreme sacrifice for the physical liberation of Bangladesh not only from the Pakistani occupation forces but also from local Islamist paramilitia forces who fought against the Bangladesh freedom fighters. The constitutional status of state religion thus appears to be a denial of the embryonic foundation of Bangladesh that grew in stages into a formidable movement for emancipation from religious abuses and exploitation. This denial seems to be equivalent to Pakistan saying that Jinnah's two-nation theory of 1940 was wrong, the theory that formed the very basis and justification for the creation of a Muslim state by dividing the Hindu majority united India.

In addition, the constitution has identified Bangladesh as a republic of democracy where fundamental human rights and freedoms shall be guaranteed.⁶⁵ In order to facilitate the effectiveness of democracy, secularism has a greater role to play. However, the presence of state religion along with secularism vitiates the vision of a secular society while making democracy dysfunctional.⁶⁶ A functional democratic system requires neutrality towards religion which is missing under the current constitutional fabric of Bangladesh.⁶⁷ The aforesaid discussion indicates that the spirit of democracy, rule of law, and secularism is implanted throughout the body of the constitution and the promulgation of state religion completely disregards such spirit behind the adoption of the constitution.⁶⁸

4.7 Secularism Along with State Religion: Implications for Minority Rights and Communal Harmony

In addition to the aforesaid incompatibility between state religion and secularism, the declaration of Islam as the state religion is considered as violation of the rights of those whose religion is other than Islam.⁶⁹ Such primacy of one particular religion leaves adverse impact on fundamental human rights and freedom and equality of citizens guaranteed under the constitution. The presence of a state religion is likely to

⁶³ *ibid.* 22.

⁶⁴ Art 9 of the Constitution of Bangladesh.

⁶⁵ Art 11 of the Constitution of Bangladesh.

⁶⁶ Rahman (n 50) 22.

⁶⁷ *ibid.* 22.

⁶⁸ Bhuiyan (n 19) 224.

⁶⁹ *ibid.* 223.

facilitate adoption of laws and policies favoring or opposing the interest of some community or communities.⁷⁰ This influence of religion is evident in the government's reservations in ratifying the *International Convention for the Elimination of Discrimination against Women 1979* (CEDAW). Bangladesh has made a reservation to CEDAW articles 2, 13(a), 16 (1c), and 16 (1f) on the ground that these CEDAW provisions 'conflict with Sharia law based on Holy Quran and Sunna' to the exclusion of all other religions, which are discriminated against and ignored.⁷¹

It is noted that the declaration of Islam as state religion opened the gateway of communal politics while making room for the abuse of religion for governance and political purposes.⁷² Islam has been used as a political tool to legitimise the autocratic and military rule.⁷³ The immediate outcome of such political use of religion was the deterioration of communal harmony which had been witnessed from series of minority persecution incidents.

The demolition of the Babri Masjid by Hindu fundamentalists in India caused a backlash against Hindu lives and properties in Bangladesh.⁷⁴ The then government had to impose curfew to tackle religious protesters who attempted to set fire to Hindu temples in old sections of Dhaka.⁷⁵ Immediately after this incident, the communal harmony in the region deteriorated. Such deterioration of communal harmony continued in Bangladesh even after the democratic governments took power in 1991. Bangladesh witnessed the most blatant communal attacks along with the destruction of Hindu lives and properties after the national election in 2001. It is reported that the supporters of the parties who got victory in the election conducted 'a systematic campaign of violence against Hindus for about 150 days'.⁷⁶ The probe report by a Judicial Commission revealed that about 18,000 incidents of major crime were reported where about 1000 Hindu women were raped and among them, 200 were victims of gang rape.⁷⁷ The report also indicated that approximately 500,000 Hindus left the country to India after this communal violence.⁷⁸ It has been alleged that since Hindus were considered to be the vote banks of the defeated party

⁷⁰ *ibid.* 224.

⁷¹ The UN Human Rights Treaty System, CEDAW – Bangladesh: Reservations, Declarations, Objections and Derogations <http://www.bayefsky.com/html/bangladesh_t2_cedaw.php> accessed 2 March 2022; Maliha Khan, 'CEDAW is at a dead end in Bangladesh' *The daily Star*, Dhaka 8 March 2019 <<https://www.thedailystar.net/star-weekend/news/cedaw-dead-end-bangladesh-1711840>> accessed 2 March 2022.

⁷² Jahan (n 2) 15.

⁷³ Guhathakurta (n 32) 291.

⁷⁴ *ibid.*, 291.

⁷⁵ 'Minorities at Risk Project, Chronology for Hindus in Bangladesh' (2004), <<https://www.ref-world.org/docid/469f3869c.html>> accessed 30 January 2022.

⁷⁶ Vivek Gumaste, 'There may be no Hindus left in Bangladesh in 30 years' *Sunday Guardian Live*, 8 February 2020 <<https://www.sundayguardianlive.com/opinion/may-no-hindus-left-bangladesh-30-years>> accessed 30 January 2022.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

Bangladesh Awami League, the activists of the victorious BNP-led alliance employed the strategy to suppress the minority people.⁷⁹ Such state-instigated communalism portrayed the abuse of a religious community only because they belong to a particular religion while violating the mandate of a secular constitution and its guarantees for all citizens regardless of their religious affiliation. It is noted that the use of religion in politics has been manifested during 2001–2006 term which was continued in the successive government regimes.⁸⁰

A study by Ain o Salish Kendra (ASK), a leading human rights NGO in Bangladesh, revealed that there have been over 3600 attacks in Bangladesh targeting Hindus in the last 9 years (2013–2021).⁸¹ The attacks include, among others, vandalism, arson, and the demolition of Hindu temples, idols, and places of worship.⁸²

In 2012, at least 12 Buddhist temples and 50 houses in Ramu of the Cox's Bazar District were destroyed by the religious extremists being influenced by a Facebook post which allegedly hurt their 'religious sentiments'.⁸³ In 2013, more than 25 houses belonging to Hindus were vandalized, several temples were destroyed and about 150 families were forced to flee from the concerned locality in Pabna.⁸⁴ This incident also started over a Facebook post that allegedly maligned Prophet Mohammad (pbuh).⁸⁵ Similar pattern of minority attack over Facebook post also took place in 2016 in Brahmanbaria where 150 homes and 15 temples were vandalized and at least 20 temple devotees were left wounded.⁸⁶ The attack on minorities on the pretext of Facebook post insulting religion has been continued.⁸⁷ The incumbent government has been blamed for failing to protect minorities from such communal violence. Even the attacks and assaults on minorities are often not investigated and prosecuted.⁸⁸ In few cases, members of the ruling parties were allegedly found to be involved in inciting communal violence.⁸⁹

⁷⁹ Guhathakurta (n 32) 291.

⁸⁰ Minorities at Risk Project (n 75) 37.

⁸¹ 3710 attacks on Hindu community in last 9 years: Reports Ain o Salish Kendra, published on 19 October 2021 <<https://www.thedailystar.net/news/bangladesh/news/3710-attacks-hindu-community-last-9yrs-2201861>> accessed 30 January 2022.

⁸² *ibid.*

⁸³ Matiur Rahman Minar and Jibon Nahar, 'Violence originated from Facebook: A case study in Bangladesh' <<https://arxiv.org/abs/1804.11241>> accessed 20 March 2022.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ Attack on minorities, 'Facebook posts insulting religion' a familiar tactic, *The Daily Star*, Dhaka, 8 April, 2021, <<https://www.thedailystar.net/city/news/facebook-posts-insulting-religion-familiar-tactic-2074033>> accessed 20 March 2022.

⁸⁸ A risk assessment of country-of-origin information (COI) by the UK Home Office, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/514400/CIG_Bangladesh> accessed 31 January 2022.

⁸⁹ Minar and Nahar (n 83).

The recurring incidents of communal violence accelerated the vulnerabilities of minority communities and reaffirmed the prevalence of the religion of the dominant community. It is noted that ‘the increasing presence of political Islam has steadily eroded the secular foundations of the nation-state’ while jeopardising the constitutional rights of minorities.⁹⁰

Though the principle of secularism was revived first by the Supreme Court and subsequently by the fifteenth amendment to the constitution, the fragile state of minority rights remained along with the prevalent presence of the dominant religion. It is worth mentioning that the incumbent government attempted to reformulate certain religious expressions to give coherent meaning to secularism considering the new political reality. However, such modifications could not bring back the essence of secularism which was originally adopted and understood in the 1972 constitution. Rather, it was alleged that the revival of secularism along with the retention of state religion provision indicates political concessions while allowing the role of religion in politics.⁹¹ Such concessions portray the strong presence of religion and its resultant communal violence in the present national life of Bangladesh, an opportunistic political fulcrum which has been continuing unabated ever since its introduction by the military rulers after 1975.

Over the years, the political use of religion has been ‘pioneered’ by the subsequent governments that facilitated them to retain in power at the cost of rising communalism. Despite the constitutional pledges to ensure equal rights and status of ‘other’ religions, the religious minorities in Bangladesh remain the constant victims of discrimination, persecution, and harassment.⁹² It is apprehended that such tormenting acts on minorities compelled them to flee or migrate which are evident from the declining percentage of the Hindu population.⁹³ In 1971, Hindus accounted for 23 per cent of the total population which is currently stands at 8%.⁹⁴

The sorrow state of minority rights discussed above indicates the fragile commitment of the state towards the elimination of ‘any discrimination against, or persecution of, persons practicing a particular religion’. It is noted that even if the constitution asserts for the elimination of granting favors to any religion and prohibits any form of political status for a religion, according to the constitutional status to a particular religion as the state religion reflects a preferential treatment to that religion. Such preferential treatment indicates a contradictory and confusing stand of the constitution on secularism leaving adverse implications for the religious minorities. It is reiterated that providing equal status to all religions does not correct

⁹⁰ Dina M Siddiqi, ‘Secular Quests, National Others: Revisiting Bangladesh’s Constituent Assembly Debates’ (2018) 49(2) *Asian Affairs* 239.

⁹¹ Guhathakurta (n 32) 289.

⁹² Press Statement, ‘Preliminary findings of visit to Bangladesh by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief’, UN Human Rights Office of the High Commissioner, 9 September 2015 <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16399&LangID=E>> accessed 31 January 2022.

⁹³ *ibid.*

⁹⁴ *ibid.*

the contradiction between ‘religious neutrality by eliminating political status to any religion’ as stipulated in article 12 and ‘declaring state religion’ as reflected in Art 2A.⁹⁵ In this regard, Emeritus Professor Anisuzzaman argued that ‘if the founding fathers of the constitution wanted to provide equal status to all religions, then the language of Art 12 would have been quite different, so as to make such an idea compatible’.⁹⁶ It is further argued that secularism, as per article 12, should be understood in its simplest sense while refereeing that the state shall not provide any political recognition to any religion.⁹⁷ The constitutional mandate regarding the elimination of abuse of religion for political purposes under article 12 also cannot be achieved because of the aforesaid contradiction between secularism and state religion.

4.8 Conclusion

The positioning of the principle of secularism in the constitutional text remains in a dubious stand that creates obstruction to the full realisation of secularism in practice. The fifteenth amendment to the constitution attempted to harmonise religiosity and secularity; such so-called harmonious combination is inadequate to fulfill the constitutional stipulation of eliminating communalism and abuse of religion for political purposes. Under the current constitutional fabric, secularism is incompatible with the dominant presence of any religion. Consequently, the co-existence of secularism and state religion shoved in the constitution appears to be a distortion of the historical genesis of secularism in Bangladesh and its original meaning as propagated by Bangabandhu. It is fraught with the potential of transforming Bangladesh from a non-communal to a communal state.

The numerous incidents referred to are indicative of the increasing influence of religion on the political and public life of the citizens of Bangladesh. The use of religion as a political tool becomes a worrying trend in the contemporary political discourse of Bangladesh. Such political use of religion leaves adverse effects on the rights of minorities in the form of discrimination and harassment. It is noted that the increasing use of religion in the public sphere may provide political gains which are illusory and temporary; however, the moral losses for such political gains are substantive and permanent.⁹⁸ In order to establish a society with high ideal of secularism for which the people of Bangladesh across religions struggled and

⁹⁵ Guhathakurta (n 32) 17.

⁹⁶ Anisuzzaman, ‘Dharmanirapekhyta Prosongay’ (about Secularism) in Mahfuza Khanam and Topon Kumar Dey (eds), *Dharmanirapekhyta: Samprodayik Samprতির Mail-Bandan (Secularism: Connecting tool for communal harmony)* (Merit Fair Prokashan, Dhaka 2015) 17.

⁹⁷ *ibid.*, 13.

⁹⁸ Ahrar Ahmad, ‘Secularism in Bangladesh: The troubled biography of a constitutional pillar’ *The Daily Star*, Dhaka, 16 December 2020 <<https://www.thedailystar.net/supplements/news/secularism-bangladesh-the-troubled-biography-constitutional-pillar-201933>> accessed 2 February 2022.

sacrificed their lives for their cherished Bangladesh, legislative de-communalisation reform is in order and indeed imperative. The state should revisit the constitutional provisions with an aim to remove the aforesaid contradictions to guarantee minority rights. It is reiterated that the goal of the principle of secularism cannot be achieved if the social and political order is not made free from institutionalised religious domination.

References

Books

- Bhargava, Rajeev, and Ashok Acharya, eds. 2008. *Political Theory: An Introduction*. Pearson Education.
- Islam, Mahmudul. 2019. *Constitutional Law of Bangladesh*. Dhaka: Mullick Brothers.

Chapters in Edited Books

- Anisuzzaman. 2015. 'Dharmanirapekhyta Prosongay' (About Secularism). In *Dharmanirapekhyta: Samprodayik Samprতির Mail-Bandan (Secularism: Connecting tool for communal harmony)*, ed. Mahfuza Khanam and Topon Kumar Dey. Merit Fair Prokashan.

Articles

- Ahmed, T. Kuru. 2007. Passive and Assertive Secularism: Historical Conditions, Ideological Struggles, and State Policies Towards Religion. *World Politics* 59 (4): 568–594.
- Ali, Md Sikandar. 2020. The Legacy of Bangabandhu's Secular Political Ideals. *International Journal of Advance Research and Innovative Ideas in Education* 6 (4): 353–357.
- Bhuiyan, Jahid Hossain. 2017. Secularism in the Constitution of Bangladesh. *The Journal of Legal Pluralism and Unofficial Law* 49 (2): 204–227.
- Billah, S., and M. Masum. 2014. Can Secularism and State Religion Go Together? *ELCOP Yearbook on Human Rights* 15: 32–51.
- Guhathakurta, Meghna. 2012. Amidst the Winds of Change: The Hindu Minority in Bangladesh. *South Asian History and Culture* 3 (2): 288–301.
- Huque, Ahmed Shafiqul, and Akhter Muhammad Yeahia. 1987. The Ubiquity of Islam: Religion and Society in Bangladesh. *Public Affairs* 60 (2): 200–225.
- Islam, MdSaidul. 2011. "Minority Islam" in Muslim Majority Bangladesh: The Violent Road to a New Brand of Secularism. *Journal of Muslim Minority Affairs* 31 (1): 125–141.
- Jahan, R. 2021. Bangabandhu's Vision of Secularism for Bangladesh. In 69th Foundation day and lecture at *Asiatic Society of Bangladesh*.
- Rahman, M. 2020. The Compatibility of State Religion and Constitutional Secularism Coexistence: Bangladesh in Context. *Cambridge Open Engage* 24 (1): 6–27.
- Riaz, Ali. 2018. More than Meets the Eye: The Narratives of Secularism and Islam in Bangladesh. *Asian Affairs* 49 (2): 301–318.

- Shah, Alam. 1991. The State-Religion Amendment to the Constitution of Bangladesh: A Critique, Law and Politics in Africa, Asia and Latin America. *Quartal* 24 (22): 209–225.
- Siddiqi, Dina M. 2018. Secular Quests, National Others: Revisiting Bangladesh's Constituent Assembly Debates. *Asian Affairs* 49 (2): 238–258.
- Wohab, Abdul. 2021. "Secularism" or "No-secularism"? A Complex Case of Bangladesh. *Cogent Social Sciences* 7 (1): 1–21.

Internet Sources

- Ahmad, A. 2020. Secularism in Bangladesh: The Troubled Biography of a Constitutional Pillar. *The Daily Star*, December 16. <https://www.thedailystar.net/supplements/news/secularism-bangladesh-the-troubled-biography-constitutional-pillar-2011933>. Accessed 2 Feb 2022.
- Gumaste, V. 2020. There May Be No Hindus Left in Bangladesh in 30 years. *Sunday Guardian*, February 8. <https://www.sundayguardianlive.com/opinion/may-no-hindus-left-bangladesh-30-years>. Accessed 30 Jan 2022.
- Sen, A. 2021. *Bangabandhu and Visions of Bangladesh*. <https://blogs.lse.ac.uk/south-asia/2021/03/07/bangabandhu-and-visions-of-bangladesh/>. Accessed 20 Jan 2022.

Mohammad Golam Sarwar is an Assistant Professor of Law at the University of Dhaka and Editor of Law & Our Rights page at The Daily Star, Dhaka. He studied International Development Law and Human Rights at University of Warwick with Chevening Scholarship. He has published more than 20 research articles so far in peer reviewed journals and books published by Routledge, BRILL Nijhoff and Springer. He worked as a Legal Consultant for Trade Policy Review Project of the Ministry of Commerce Bangladesh under the Bangladesh Regional Connectivity Project-1 funded by World Bank. Recently, he has completed a research project on clean river policy in urban Asia undertaken by the University of Oxford. Over the years, He worked as a Legal and Policy Expert for various agencies including the Office of the UN Resident Coordinator (UNRCO), UNDP, UNHCR, UNODC, UN Women, European Union, ILO, IDLO, Ministry of Foreign Affairs, Ministry of Home Affairs, and Ministry of Law Bangladesh.

Chapter 5

Constitutional Recognition of Customary International Law in Bangladesh



Nakib M Nasrullah

Abstract Since the colossal growth of international law and practices in the 1950s, its principles have increasingly become a relevant consideration in constitutional ideas, concepts, and rulemaking. Due to the restraint based on the conflict between monism and dualism in the application of treaty principles, states are often seen to have paid attention to the integration of customary principles into their constitutions to fulfill their constitutional and international commitments towards the protection of the rights of citizens, compliance with obligation of *jus cogens* norms, ensuring full democratisation, and participation in global peacebuilding. The Constitution of Bangladesh is no exception to this global trend. As a constitution of a newborn state in 1972, it considered in its rulemaking process the inclusion of international legal norms and ideas derived from international customary principles as a basis for its democratic administration. This chapter examines how far international customary principles have influenced or used as guidance for the constitution framing in Bangladesh. It focuses on the textual and contextual interpretation of the relevant constitutional provisions using the content-specific customary international law principles. It draws a conclusion on the role of the customary international law principles on the constitutional rulemaking, primarily on the fundamental rights of citizens.

Keywords Customary international law · Recognition · Rulemaking · Human rights · Jus cogens · Legal commitments · Principle of legality · State ownership · Sovereignty over natural resources

N. M. Nasrullah (✉)

Department of Law, University of Dhaka, Dhaka, Bangladesh

e-mail: nnakib@du.ac.bd

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*,
https://doi.org/10.1007/978-981-99-2579-7_5

5.1 Introduction

The recognition of international law principles by national constitutions was immensely augmented after the World War II through the development of human rights legal regimes and the process of democratisation in the Sixties. It was sponsored by inter-governmental and regional organisations, especially the UN. States found international law principles derived from treaties or international customs relevant to constitutional rulemaking to meet the demand of democratisation and human right-based governance. Guaranteeing fundamental rights of citizens as a growing global democratic phenomenon warrants the invocation of international law principles in national constitutions for national enforcement. Alongside the integration of treaty principles with the determination of their status in national legal regimes, customary principles are also paid attention directly or indirectly in shaping the text of constitutional provisions or modeling them as such thereon. Many states have followed customary norms in constitutional rulemaking as part of the fulfillment of their international commitments to avoid the cumbersome procedural requirements for treaty incorporation.

States have followed diverse patterns in integrating customary norms. Some states have used the references of customary principles specifying their status in national legal regimes, some have resorted to subject-specific references, and others' constitutions reflect on the combination of both. The constitutions of many states such as South Africa, Russian Federation, the Philippines, Japan, Hungary, and Bulgaria provide for direct applicability of customary principles in national legal regimes. On the other hand, the constitutions of India, Malaysia, and Indonesia have used the subject-specific references of customary norms in formulating constitutional principles, exemplified by fundamental human rights, independence of judiciary, national or maritime territory, principle of strict legality, and citizens' equal participation in public affairs.

The Constitution of Bangladesh is silent about any principle determining the direct applicability of customary international law principles in domestic law. But it has touched upon or addressed many subject-specific customary norms in formulating its constitutional principles. This chapter identifies the use of the references of international customs in formulating the texts of constitutional provisions in Bangladesh. The textual interpretation of both customary norms and corresponding constitutional provisions constitute the main basis of attaining this objective. For an orderly accomplishment, the work is outlined with establishing a relevancy of international principles to constitutional rulemaking and sketching and evaluating the state practices of constitutional integration of international customary principles in general and Bangladesh in particular, followed by an evaluation of subject-specific customary norms recognised in the Constitution of Bangladesh.

5.2 Relevancy of International Law to Constitution-Making

In the pre-Second World War situations, the internal exercise of state sovereignty was paid more attention in constitutional rulemaking than its external exercises.¹ After the Second World War when UN was established as a global platform the continued and wide scale development of both international law and relations influenced the state constitutions to consider international legal norms in designing and implementing the process of constitutional rulemaking. Many constitutions clearly established the position of international law through their domestic law provisions, while others touched upon or incorporated the relevant provisions of international treaty or customary principles in the fulfillment of state's international legal commitments.

There are certain issues of international legal commitments often deemed to be influential in drafting the text of the constitutions; one relates to the aspects of state's governmental system, another relates to the aspect of human rights protection of the citizens.² The two aspects of governmental system such as democracy and independence of judiciary are required by international law principles established by particular human rights instruments. As regards to democracy, the article 21 of the UDHR stipulates the right to 'take part' in government as well as the article 25 of the ICCPR codifies the right to vote in fair elections.³ Its article 25 also declares the right 'to take part in the conduct of public affairs, directly or through chosen representatives' which some scholars interpret that with this international law provides a basis for a right to participate in making a constitution.⁴ This right is broadly resounded in other international instruments such as the CEDAW,⁵ the General Comment of the UN Commission on Human Rights,⁶ and the 2009 Guidance Note on United Nations Assistance to Constitution-making Process.⁷ The concept of independence of judiciary finds its origin and roots in the UDHR as its

¹ Cheryl Saunders, 'Constitution and International Law' (International Institute for Democracy and Electoral Assistance (2020) <<http://constitutionnet.org/myconstitution-myanmar>> accessed 1 March 2022.

² *ibid.*

³ Hilery Charlesworth, 'International Legal encounters with democracy' (2017) 8(1) *Global Policy* 34.

⁴ Vivien Hart, 'Constitution making and the right to take part in a public affairs' in LE Miller and L Aucion (eds), *Framing the State in Times of Transition* (US Institute of Peace, 2010) 20. <[https://www.usip.org/sites/default/files/Framing%20the %20State/Chapter2_Framing.pdf](https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter2_Framing.pdf)> accessed 15 March 2022.

⁵ The Convention on the Elimination of All Forms of Discrimination against Women 1979, art 7.

⁶ General Comment No.25: 'The Right to Participate in Public Affairs, Voting Rights and Right to Equal Access to Public Affairs' (1996) <<https://www.equaltrust.org>> accessed 15 March 2022.

⁷ Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Process (2009) <[https://www.un.org/rule of law/blog/document/guidance-note-of the secretary-general-united-nations-assistance-to-constitution-making process Final.pdf](https://www.un.org/rule%20of%20law/blog/document/guidance-note-of-the-secretary-general-united-nations-assistance-to-constitution-making-process-Final.pdf)> accessed 20 March 2022.

article 10 establishes an individual's right to 'hearing by an independent and impartial tribunal' and similar requirements in other international instruments are firmly reinforced by the statements of the principle.

The constitutions of most of the countries in the present world seek to base their constitutional framework on democracy and the independence of judiciary in general and through different institutional arrangements. Although as a domestic legal instrument a constitution is supposed to rely on local contexts and draw its insights from comparative national experiences, the salient features of the democracy established by international law principles such as accountability, equality, and the prevention of arbitrariness require the state authority to recognise these relevant to constitutional rulemaking.⁸ The same reality is seen in the case of the independence of judiciary which is premised on fair and impartial adjudication, non-discriminatory, and non-arbitrary use of judicial power.⁹

In most of the constitutions, principles relating to the identification and protection of the citizens' human rights form the bulk of their texts. In this respect, states' international obligations for the protection of human rights play a very influential role. States fulfill their commitments of compliance through such constitutional recognition and embodiment of international human rights norms. Even, the norms of international human rights are referred and resorted to as interpreting tools for citizens' rights guaranteed by the constitutions. Some aspects of international human rights appear to be very relevant to the structures of a democratic government as stated earlier. Human rights norms also form the preamble of a constitution representing the philosophical ideals and vision of a state.

It is true that a state is not under an obligation to include international human rights norms into its constitution to fulfill its international commitments. A state can fulfill instead its international obligation of compliance through the process of incorporation into different national legislation. It is however often seen that a state finds it more relevant to include human rights norms in its constitutional principles to give them highest importance as part of the supreme law. It can determine associated decision-making criteria regarding their operation in practice by defining their fundamental character, any limitation to which they are subject, non-derogable rights during emergency, entitlement to these rights including non-citizens, against whom the rights are held, including against non-state actors, and the nature and procedures for their enforcement.¹⁰

National constitutions also sometimes consider additionally the provisions respecting their position to carry out the decisions of international public organisations including the UN and other organisations working for international peacebuilding. They also recognise international law provisions setting the standards for treatment of alien, declaration of war, treatment with indigenous and vulnerable groups of people, extradition, and international offences.¹¹

⁸ Charlesworth (n 3).

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

5.3 Constitutional Recognition of Customary International Law: Nature and Approach

Like treaties, the state constitutions have paid attention to the customary principles of international law in many ways. These constitutions sometimes have made references to the determination of the status of customary principles and their effects in national law jurisdictions. Some constitutions, without determining status, have borrowed subject-specific contents from customary international principles, some combine both. In a recent study under the Comparative Constitution Project at the University of Texas, 62 constitutions were found to have contained references to the customary principles of international law.¹² The study classified the constructional references into three categories, namely direct application of international custom in national law, subject-specific references, and the combination of both.¹³ The findings revealed that, among 62 constitutions, 14 constitutions have referred to the customary international law in the context of its direct applicability in national laws, 29 constitutions have made references to subject specific areas. Additional 19 constitutions contained a mix of subject-specific references and provisions making customary laws directly applicable in the national legal orders.¹⁴ The subject-specific references mainly include fundamental human rights, international or foreign relations, asylum, national and maritime territory, issues of international crimes, principle of strict legality, treatment with foreign nationals, and governmental powers and federalism.¹⁵

The constitutional clauses containing the direct applicability provisions have dealt with the determination of the status of customary principles and their effect in the national legal orders. For examples the South African Constitution states that the rules of customary international law shall be binding on the Republic, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.¹⁶ The Russian Federal Constitution 1993 under its article 15(4) provides that ‘the generally recognised principles and norms of international law and the international treaties of the Russian Federation shall constitute the part of its legal system’.¹⁷ Article 98(2) of the Japanese Constitution 1946 states that ‘treaties concluded by Japan and established laws of nations shall be faithfully observed.’ This provision is taken as incorporating international law, both relevant treaty and customary law, into Japan’s legal system.¹⁸ The Philippine Constitution 1987 under

¹² University of Texas, ‘Comparative Constitutional Project’ (2013) <<http://comparativeconstitutionproject.org>> accessed 7 April 2022.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ The Constitution of the Republic of South Africa 1996, s232.

¹⁷ Malcom N Shaw, *International Law* (Cambridge University Press 2014) 127.

¹⁸ Shigeru Oda (ed), *The Practice of Japan in International Law 1961–1970* (University of Tokyo Press, Japan, 1982); YIwasawa, ‘The Relationship Between International Law and National Law: Japanese Experiences’ (1993) 64 *British Yearbook of International Law* 333.

its article II (2) recognises the direct applicability of customary principles in domestic law. It states that ‘the Philippines... adopts the generally accepted principles of international law as part of the law of the land...’ It is stipulated in article 10 of the Italian Constitution that the Italian legal order ‘shall conform to the generally recognized rules of international law’. The text of the article clearly establishes the supremacy of customary laws and their overriding capacity in the domestic legal system. Article 8 of the Portuguese Constitution 1933 sets forth that the rules and principles of general or customary international law are an integral part of Portuguese law.

The central European Constitutions mostly have provisions concerning the acceptance of customary international law into national legal systems.¹⁹ The Hungarian Constitution ‘accepts the universally recognized rules and regulations of international law.’²⁰ In Bulgaria the Constitutional Court is to pass upon the consistency of internal law ‘with accepted standards of international law’.²¹ The Yugoslav Constitution declares that ‘generally accepted rules of international law as well as treaties are made the integral part of the domestic legal system’.²² The Constitution of Slovenia recognises the supremacy of customary international and treaty principles over national laws as it requires national laws to be in accordance with generally accepted principles of international law as well as with treaties.²³ The Constitution of Estonia provides that ‘generally recognized principles and norms of international law are an integral part of the Estonian system of justice’.²⁴

It is pertinent to mention that the domestic applicability of customary principles as established by many constitutions discussed above does not require constitutional authorisation or to be under the process of legislative implementation for its application by national courts irrespective of existing differences based upon monism or dualism. According to a recent study dealing with the analysis of the status of international law in 101 countries between 1815 to 2013, ‘in virtually all states, close to 90%, ‘Customary International Law are in principle directly applicable without legislative implementation’.²⁵

¹⁹ Eric Stein, ‘International Law in Internal Law: Towards Internationalization of Central-Eastern European Constitutions?’ (1994) 88(3) *Am. J. Int’l Law* 427.

²⁰ The Constitution of the Republic of Hungary 2001, art Q (3).

²¹ The Constitution of the Republic of Bulgaria 1991, art 149(4).

²² The Constitution of the Federal Republic of Yugoslavia 1992, art 16(2).

²³ The Constitution of the Republic of Slovenia 1990, art 8.

²⁴ The Constitution of the Republic of Estonia 1992, art 3.

²⁵ Pierre-Hugues Verdier and Mila Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109 *Am.J.Int’l Law* 514.

5.4 Recognition of Customary Principles in the Constitution of Bangladesh

The Constitution of Bangladesh has borrowed the contents of existing international customary principles for the construction of its text in certain aspects and thus international customary principles have gained constitutional recognition and become indirectly the part of the supreme law. The bulk of subject-specific references involve human rights principles designated as fundamental rights under part III of the Constitution (which possess mandatory character for enforcement). Some of the human rights are incorporated in the part II of the Constitution as fundamental state policy. The fundamental rights largely include the protection of human dignity, protection of life, equality before law, religious non-discrimination, prohibition of arrest and detention for an indefinite time, prohibition of forced labour, prohibition of torture or cruel, inhuman and degrading treatment, freedom-oriented rights, protection of privacy, and so on. All these constitutional guarantees and standards find their origins in customary principles of international law. In addition, other constitutional provisions such as the principle of non-retroactivity and state sovereignty over natural resources are also influenced by the customary principles. The following sections focus on the integration of customary principles into the Constitution.

5.4.1 Fundamental Rights and Their Customary Basis

5.4.1.1 Right to Life

Article 32 of the Constitution of Bangladesh recognises the right to the protection of an individual's life and liberty. It reads 'No person shall be deprived of life and personal liberty'. This right to life has been confirmed by all human rights documents²⁶ prohibiting the arbitrary deprivation of life which has been elevated to the status of the principle of *jus cogens* (peremptory). The customary nature of this right has been confirmed by many human rights bodies. The Human Rights Council's Special Rapporteur on extrajudicial, summary or arbitrary executions has spoken of 'the supremacy and non-derogability of the right to life under both treaty and customary international law'.²⁷ The Special Rapporteur views that '(w)henever a State is responsible for an unlawful killing, international law requires reparations in the form of compensation and /or satisfaction. This obligation is based on general

²⁶ The Universal Declaration of Human Rights 1948, art 3; ICCPR 1966, art 6; African Charter on Human and People's Rights 1981, art.4; ECHR 1953, art 2; ACHR 1965, art 4.

²⁷ Christof Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (A/HRC/23/47, para 36); William A Schabas, *The Customary International Law of Human Rights* (OUP 2021) 111.

customary international law’.²⁸ In support of its status as a *jus cogens* principle, Inter-American Commission on Human Rights states that the right to life has ‘attained the status of customary, and indeed peremptory, norms of international law’.²⁹ A similar view has been maintained by the African Commission on Human and People’s Rights as it describes the right to life as a norm of customary law and of *jus cogens*. According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) ‘the inherent right to life’ is a norm of customary international law.³⁰

5.4.1.2 Prohibition on Torture and Cruel, Inhuman, or Degrading Treatment or Punishment

The prohibition of torture and cruel, inhuman, or degrading treatment or punishment has been recognised by the Constitution of Bangladesh in its article 35(3). This is an unqualified customary principle of international law codified in numerous universal and regional treaties and declarations, even pursued in national constitutions and criminal law legislation.³¹ The acts of torture are regularly denounced within national and international fora.³² Many international courts and tribunals have identified it as a customary principle. For examples, a Trial Chamber of ICTY observed that the definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ‘reflects a consensus...representative of customary international law.’³³ In *Prosecutor v Blaskick*³⁴ and *Prosecutor v Cordic and Cerkez*,³⁵ the Appeals Chamber of the ICTY said that ‘to be free from cruel, inhuman and degrading treatment or punishment’ was a norm of customary international law. A Trial Chamber of the ICTY in *Prosecutor v Furundzija* in 1998 attached a high importance to the prohibition of torture by saying ‘there exists today universal revulsion against torture’.

The judgment of the International Court of Justice in *Belgium v Senegal* only pronounced its customary status rather declared it to be a norm of *jus cogens*. No exception from it can be contemplated even at the event of emergency, as seen by

²⁸ Heyns (n 27) para 56.

²⁹ *Mario AlferodoLares-Reyes et al v United States* (2002) IACHR, Case 12,379, Report No. 19/02, 27 February 2002, para 46.

³⁰ *Prosecutor V Balaskick* (2004) ICTY, IT-94/14/2, para 143.

³¹ For examples, CAT, ICCPR, UDHR, Four Geneva Conventions 1949 and the General Assembly Resolution 3452.

³² Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), (2012) ICJ Reports 422, para 99.

³³ *Prosecutor v Delic et al* (1998) ICTY, IT-96-21, para 459.

³⁴ *Prosecutor v Balaskic* (2004) ICTY, IT-94/14-A, para 106.

³⁵ *Prosecutor v Lordic and Cerke* (2004) ICTY, IT -95-14/2, para 106.

contrast in case of ‘right to life’.³⁶ The prohibition of torture was included in the draft list of *jus cogens* norms adopted by the International Law Commission in 2019.³⁷ The human rights tribunals, committees and commissions including ECHR,³⁸ IACHR,³⁹ ICTY,⁴⁰ the Committee Against Torture, the Committee on the Elimination of Discrimination against Women,⁴¹ the African Commission on Human Rights⁴² and many other national courts⁴³ have confirmed its status as a norm of *jus cogens*.

5.4.1.3 Prohibition of Forced Labour

Article 34(1) of the Constitution of Bangladesh prohibits all forms of ‘forced labour’. It states that ‘all forms of forced labour are prohibited, and any contravention of this provision shall be an offence punishable in accordance with law’. The prohibition of forced or compulsory labour was rooted first in ILO Convention 29 concerning Forced and Compulsory Labour adopted in 1930 that obliges States ‘to suppress the use of forced or compulsory labour in all its forms within the shortest possible period’. The ILO Convention 105 on the Abolition of Forced Labour ratified so far by 178 states⁴⁴ prohibits the use of forced labour as a means of political coercion or repression, for economic development, for labour discipline and punishment for strikes, and as a means of racial, social, national, or religious discrimination.⁴⁵ The ILO’ Committee of Experts says that the principles of

³⁶ *Belgium v Senegal* (Questions relating to the obligation to prosecute or extradite), (2009) ICJ Reports 19; (2012) ICJ Reports 422.

³⁷ The Reports of International Law Commission, Seventy First Session (29 April–7 June and 8 July–9 August 2019), A/74/10, 207; also, Forth Report on peremptory norms of general international law (*jus cogens*) by Dire Taldi, Special Rapporteur, A/CN.4/727, paras 69–77; A/CN.4/SR.3463, 8–9.

³⁸ *Al-adsani v the United Kingdom* (2001) ECHR, 35763/97, 61; *Nait-Liman v Switzerland* (2018) ECHR, 51357/07, partly dissenting opinion of Judge Wojtyczek.

³⁹ *Women Victims of Sexual Torture in Atenco v Mexico* (2018) IACHCR, C/37, para 178; *Herzog et al. v Brazil* (2018) IACHR, C/353, para 220.

⁴⁰ *Prosecutor v Furundzija* (1998), ICTY, IT-95-17/1-T, paras 153–57; *Prosecutor v Simic* (2002) ICTY IT-95-9/2-S, para-34.

⁴¹ General Comment 2, Implementation of article 2 by State Parties, CAT/C/GC/2, para 1; General Recommendations 35 on gender-based violence against women, updating general recommendation 19, CEDAW/C/GC/35, para 25.

⁴² *Muhammad Abdullah Saleh Al-Asad v Djibuti*, (2014) IACHR, 383/10, para 179.

⁴³ *Amnesty International and Commonwealth Lawyers Association v Secretary of State for the Home Department*, (2005) UKHL 7; (2007) 1 AII ER 575, para 31.

⁴⁴ Several of them are not even parties to the International Covenant on Civil and Political Rights such as Comoros, Cook Islands, Cuba, Fiji, Kiribati, Malaysia, Myanmar, Oman, St Kitts and Nevis, Saint Lucia, Saudi Arabia, Singapore, Solomon Islands, South Sudan, and United Arab Emirates.

⁴⁵ The Convention 29 Concerning the Abolition of Forced Labour (1946), art 1.

prohibition in this respect as embodied in ILO Conventions have been incorporated in various international instruments, both universal and regional, as part of basic human rights and have therefore become a peremptory norm of international law.⁴⁶ With reference to the ILO's determination, the Supreme Court of Canada has said that 'to the extent that debate may exist about whether forced labour is peremptory norm, there can be no doubt that it is at least a norm of customary international law'.⁴⁷

5.4.1.4 Equality and Non-discrimination

Articles 27 and 28 of the Constitution of Bangladesh recognise the principles of equality and non-discrimination. Article 27 states that all citizens will be treated equally in the eye of law, and they are also entitled to equal legal protection.⁴⁸ Article 28 prohibits all kinds of religious, racial, sexual/gender discrimination and discrimination in terms of place of birth against any citizen. It also guarantees that women and men will be treated equally in all spheres of state and public life. The human rights notions of equality and non-discrimination are at the heart of all human rights principles and therefore have achieved high level of recognition in all treaties either universal or regional and declarations and resolutions of intergovernmental organisations. This is indeed a codification of customary principle in treaty laws.

The first judicial argument of its recognition was Judge Tanaka's dissent in the *South-West African Case*. He considered in this case that 'the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law' as the Charter of the UN, Resolutions of the General Assembly condemn apartheid, agreements respecting the trust territories and above all, UDHR.⁴⁹ The 1987 Restatement of the American Law Institute designated 'systematic racial discrimination as a customary norm', although it did not include 'gender or religion' based discrimination, the accompanying Comment noted that 'the systematic discrimination on grounds of religion as a matter of state policy is a violation of customary law'.⁵⁰ The IACHR considered in a case that 'the principle of equality and equal protection before law and non-discrimination belongs to *jus cogens* because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws'.⁵¹ Judge Tsotsoria

⁴⁶ Schabas (n 27) 147.

⁴⁷ *Nevsun Resources Ltd. v. Araya* (2020) SCC 5, para 102.

⁴⁸ The Constitution of Bangladesh 1972, art 27.

⁴⁹ *South-West Africa case* (1966) ICJ (second phase judgment) 1966 ICJ Reports 6, 250–322 (dissenting opinion of Judge Tanaka) 293.

⁵⁰ Restatement (Third) of the Foreign Relations Law of United States, St. Paul, (American Law Institute, 1987) para 702, Comment, para 1.

⁵¹ Juridical Condition and Rights of Undocumented Migrants (2003) IACHR, Advisory opinion OC-18/03, Series A, No.17, para 101; *Expelled Dominicans and Haitians v Dominican Republic* (2014) IACHR C/282, para 264.

of the European Court of Human Rights also maintained the status the prohibition of discrimination as a norm of *jus cogens*'.⁵²

5.4.1.5 Freedom-Oriented Rights

The Constitution of Bangladesh has recognised all freedom-oriented rights, albeit subject to reasonable restrictions, except freedom of thought and religion.⁵³ The Human Rights Committee in its General Comment 24 on Reservations, did not list first the freedom of opinion and expression under customary international law. But some 15 years later, the Committee held any reservation to these freedoms would be incompatible with ICCPR article 19(1). Due to this former and later stance of the Committee Schabas says, the Committee's message has thus been somewhat garbled, diminishing its authority in the determination of the status of freedom of opinion and expression under customary international law. He concludes that the freedom of opinion and expression is enshrined in customary international law.⁵⁴ The logical point on the freedom of opinion and expression is their association with political democracy, which is so integral and fundamental that they enjoyed protection in all democratic societies. The ECHR has observed that 'freedom of expression constitutes one of the essential foundations of democratic society and one of the basic conditions for its progress and each individual's self-fulfillment'.⁵⁵ It is notable hand that the Committee in the General Comment 23 on Reservations, declared that to deny freedom of thought, conscience, and religion is contrary to customary international law.⁵⁶

5.4.1.6 Fair Trial

The components of fair trial include *inter alia* 'trial by an independent and impartial court', 'presumption of innocence', 'information on the nature and cause of accusation', 'right to defend oneself or to be assisted by a lawyer of one's own choice', 'guarantees against double jeopardy', 'the right to be present at trial,' 'not to be compelled to testify or to confess guilt' and public trial'.⁵⁷ All these elements guaranteeing fair trail have been developed under customary international law. The ICRC identifies all these components of fair trial as customary international law.⁵⁸

⁵² *Georgia v Russia* (1) [2014] GC, 13255/07 (partially dissenting opinion of Judge Tsotoria).

⁵³ The Constitution of the People's Republic of Bangladesh 1972, arts 36, 37, 38, 38, 40, and 41.

⁵⁴ Schabas (n 27).

⁵⁵ *Mika Miha v. Equatorial Guinea*, (1994) ECHR, 414/1990, para 6(8).

⁵⁶ General Comment 23, CCPR/C/21/REv.1/Add.5, para 8.

⁵⁷ UDHR art 11 and ICCPR art 11(1).

⁵⁸ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) 384.

The Inter-American Commission has said that ‘core rights’ including right to due process and fair trial beyond any doubt ‘have attained the status of customary and indeed peremptory norms of international law’.⁵⁹ Similar observation has been made by the Venice Commission of the Council of Europe that the right to fair trial, protection against double jeopardy, and *nullum crimen sine lege* (no crime without law) ‘likely to have acquired the status of customary international law’.⁶⁰

The fair trial principles requiring the presence of accused before trial as well as his/her right to be heard of evidence against him/her have been recognised by the Supreme Court of the US as customary international law.⁶¹ Antonio Cassese while was the President of the Special Tribunal for Lebanon said in an Order on Conditions of Detention about the ‘wide recognition of the right to communicate freely and privately with counsel by the international community’ and remarked that it is ‘now accepted in customary international law’.⁶² The Constitution of Bangladesh in its article 35 recognises the several components of fair trial such as the prohibition of double punishment for the same offence,⁶³ trial by an independent and impartial court,⁶⁴ and the prohibition on compelling the accused to witness against him.⁶⁵

5.4.1.7 Principle of Strict Legality

The principle of strict legality that establishes non-retroactive character of a criminal law principle means that no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national and international law, at the time when it was committed. It also involves that no heavier penalty be imposed than one that was applicable at the time when the criminal act was committed. The textual formulation of this principle appears first in UDHR where the word ‘international law’ covers both treaty and customary international law (art 11). The non-retroactivity of the criminal act is used as a defense for the offender achieves wider recognition of all fundamental human rights instruments. The Appeals Chamber of the Special Tribunal for Lebanon and the

⁵⁹ *Mario Alfredo Lares-Reyes et al. v United States*, (2002) IACHR 12.379, (2002) 19/02, para 46.

⁶⁰ The Amicus Curie Brief for the Constitutional Court of Georgia on the non-ultrapetita rule in criminal law cases, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19–20 June, CDLAD (2015) 016-e, para 42.

⁶¹ *Hamdan v Rumsfeld* (2006) USC 557.

⁶² Schabas (n 27).

⁶³ Art 35(2) of the Constitution of Bangladesh states ‘no person shall be prosecuted and punished for the same offence more than once’.

⁶⁴ Art 35(3) of the Constitution of Bangladesh states that every person accused of a criminal offence shall have the right to a speedy and public trial by an independent court and impartial court or tribunal established by law.

⁶⁵ Art 35(4) of the Constitution of Bangladesh states that no person accused of any offence shall be compelled to be a witness against himself.

ECHR Judges have identified this principle as a peremptory norm.⁶⁶ ICRC has listed this principle under the customary principles.⁶⁷ The Constitution of Bangladesh in its article 35(1) recognises this principle by reproducing the almost similar text as established by the earlier documents. It states that ‘(n)o person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than or different from, that which might have been inflicted under the law in force at the time of the commission of an offence’.

5.4.1.8 Equal Access to Public Service

The Constitution of Bangladesh recognises the equal right to public service by all without any discrimination. Article 29 (1) states that ‘there shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic’. The paragraph 2 of the same article prescribes the grounds prohibiting the discrimination thereon such as religion, race, caste, sex or place of birth. The right of equal access to the public service is well entrenched in UDHR (art 11), ICCPR (art 25) and some regional and specialised treaties such as ACHR (art 13(2)) and CEDAW (art 7(b)). These principles have been recognised by the state constitutions leading to the increase of women participation in various organs of the government across the globe. It therefore gives rise to considerable evidence to support the inclusion of equal justice to the public service, and to public office, in the list of norms of customary international law.⁶⁸

5.4.2 Fundamental Principles of State Policy and the Customary Principles

The fundamental principles of state policy under the Constitution of Bangladesh are used as a tool for state governance and administration, guidance for national law-making as well as for the interpretation of constitutional provisions and national law principles. These principles therefore reflect on the political, social, and economic ideals and commitments of the sovereign authority of Bangladesh. Although they are directive by nature, their value on the relation between state and its citizens involving all strata of their lives including all other external affairs of Bangladesh is deemed immense and paramount. A closer look at the text of the principles reveals

⁶⁶ Unnamed defendants (Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, perpetration, cumulative charging) [2011] Special Tribunal for Lebanon, no. 11-01/1, para 76; *Maktouf and Damjanovic v Bosnia and Herzegovina* (2013) ECHR, 2312/08 and 3,417,908, para 9.

⁶⁷ Henckaerts and Doswald-Beck (n 58) 371–72.

⁶⁸ Schabas (n 27).

the fact that customary norms of international law have been pursued in the formulation of the some of the principles such as guaranteeing people's participation in government, ensuring equal opportunity for all the citizens, protection of cultural heritage of indigenous people, protection, and improvement of healthy environment, and also right to work.

5.4.2.1 Citizens' Participation in the Government

The Constitution of Bangladesh recognises this right in its article 11 saying that '(t)he Republic shall be a democracy...in which effective participation by the people through their elected representatives in administration at all levels shall be ensured'. The people's right to participation in the government is recognised first in UDHR article 21 stating the right of everyone 'to take part in the government of his country, directly or through freely chosen representatives'. The wording in the said document specifies the requirement for 'periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.' This principle relating to right to participate in the process of governmental representatives through election has been endorsed by all global and regional human rights treaty documents as a civil and political right of an individual citizen in his/her own country, for examples to name ICCPR, Protocol 1 to ECHR, the IACHR, the Arab Charter, and African Charter on Democracy.

National constitutions and legislation on a wider scale have guaranteed this right for the citizens. The Venice Commission of the Council of Europe made its observation through their frequent citation of article 21 the UDHR as a statement of customary international law, although the Human Rights Committee in its General Note 24 did not propose this on the list of customary international law norms. However, Schabas based upon its growing nature of recognition considered citizen's right to participate in government through periodic elections as a customary international legal norm as it is a path-maker for the exercise of right to democratic governance.⁶⁹

5.4.2.2 Protection of Cultural Heritage of Indigenous People

Article 23A of the Constitution of Bangladesh states that '(t)he State shall take steps to protect and develop the unique local culture and tradition of tribes, minor races, ethnic sects and communities.' The need for the protection of minorities' cultural rights has been underscored first by ICCPR article 27, which states that '[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or

⁶⁹ Schabas (n 27).

to use their own language'. A similar provision has been embodied in the Convention on the Rights of Child (arts 17, 29, 30) as well as in the Arab Charter on Human Rights (art 25). The ICCPR Committee has included in the list of customary international law prepared in its General Comment on reservations denial to minorities of the 'right to enjoy their own culture, profess their own religion' as established by article 27. There are two other legal documents namely International Labour Organization's Indigenous and Tribal People's Convention and UN Declaration on the Rights of Indigenous Peoples which have well recognised the indigenous people's right. Referring to these two documents, the Special Rapporteur on the Rights of Indigenous People has noted 'the universal applicability of those instruments...signaling the emergence of customary international law in the area of indigenous people's rights.'⁷⁰

5.4.2.3 Protection and Improvement of Healthy Environment

The Constitution of Bangladesh declares the state's obligation to protect and improve the environment as well as to preserve and safeguard the natural resources for the present and future citizens.⁷¹ This statement of obligation means otherwise the present and future citizen's right to protection of the environment. The state obligation for the protection of the environment recognises people's right to enjoy a safe, clean, healthy, and sustainable environment. This right has been recognised by all core human rights conventions. The Human Rights Council presents a statistic that more than 100 States have recognised some form of a right to healthy environment in international agreements, their constitutions, legislation, or policies.⁷² The case laws, observations of human rights courts, and treaty bodies have made references to the aspects of environmental protection relying upon the right to life.⁷³

As regards to the customary status of obligation for the preservation and protection of environment, Schabas in his recent publication refers to an attempt of the International Law Commission decades ago, it described it as *jus cogens* (peremptory) obligation 'of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas'.⁷⁴ Even the Commission in 1991 declared willful and severe damage to the environment as a crime against peace and security of mankind.⁷⁵ But a complete reserve attitude was shown by the Commission while making a list of peremptory norms by not opting it to include in the face of considerable debate on

⁷⁰ Report of the Special Rapporteur on the Rights of Indigenous Peoples, A/HRC/33/42 (2020), para 14.

⁷¹ The Constitution of Bangladesh 1972, art 18(A).

⁷² Schabas (n 27) 330.

⁷³ *Teitiota v New Zealand* (2019) HRC, 2728/2016, Cabo Verde, Concluding Observations, paras 17–18.

⁷⁴ Schabas (n 27) 331.

⁷⁵ (1991) II ILC Yearbook (Part 2) 07.

the subject.⁷⁶ However, Special Rapporteur Dire Tladi said, despite the immense importance of preservation of human environment, he thought there was ‘little evidence of the required acceptance and recognition of the international community as a whole’ that environmental norms have acquired peremptory status’.⁷⁷

5.4.2.4 State Ownership Over Natural Resources

The Constitution of Bangladesh lays down a principle relating to state ownership over its natural resources in article 143(1) under its part XI. This article establishes the ownership of Bangladesh over all mineral resources available on land territory and minerals as well as living resources within its territorial sea and continental shelf. A state’s permanent sovereignty over natural resources was recognised by the UN General Assembly Resolution 1803 in 1962 entitled ‘Permanent Sovereignty over Natural Resources’. This Resolution creates a broader scope of a state’s exclusive right of ownership and therefore utilisation and exploration of natural resources within its land and territorial waters in the interest of ‘national development and wellbeing of the people of state concerned. The Resolution was supported by a large majority of all groups concerned and thus adopted overall with 87 votes to two, with 12 abstentions. From the 1960s, many developing countries actively pursued the implementation of the principle of permanent sovereignty and, afterwards, it gained wider international recognition directly or indirectly through global and regional treaty documents. It was also invoked in many arbitral awards.

Nevertheless, contention arose as to its legal status whether it is a binding principle of international law as an expression of customary law or simply recommendatory as it was mainly recognised by the UN General Assembly Resolutions beginning from 1952 (GA Resolution of 1952 was first of this kind dealing with permanent sovereignty over natural resources). It has been inferred from some of the authors’ comments and observations that UN Resolutions on Permanent sovereignty are intended to express existing law.⁷⁸ Schrijver notes that ‘elements of the 1962 Resolution could be placed in the category of declaratory resolutions in so far as it formulated a new *opinio juris communis* [customary international law] with respect to the people’.⁷⁹ Visser notes that in *Texaco v Libyan Arab Republic* it was

⁷⁶ *ibid.*

⁷⁷ Dire Tladi (Special Rapporteur), Fourth report on peremptory norms of general international law (2019) ACN.4/727, para 136.

⁷⁸ Karol N Gess, ‘Permanent Sovereignty over Natural Resources: An Analytical Review of the UN Declaration and its Genesis’ (1964) 13(2) *International and Comparative Law Quarterly* 398.

⁷⁹ F Visser, *The principle of permanent sovereignty over natural resources and the nationalisation of foreign interests*, (Catholic Institute for Lasallian Social Action, 1988), 76–91; Yolanda TChekera and Vincent O Nmehielle, ‘The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds’ (2013) 6 *African Journal of Legal Studies* 69.

held that the Resolution 1803 is an expression of customary international law.⁸⁰ So depending upon its voting majority and references in arbitral awards, it could be concluded that it has attained the status of customary principle of international law. In addition, more importantly, the ownership of natural resources in the territorial sea⁸¹ and continental shelf has been established by the customary principle.⁸²

5.5 Conclusion

The primary objective of this chapter is to examine and explore the extent to which the Bangladesh Constitution recognises or addresses the customary principles of international law in shaping the contents and texts of its provisions on different issues. A textual interpretation of the Constitution has made it evident that the Bangladesh Constitution does not contain any provision directly articulating the status of customary principles of international law. Instead, it recognises a range of customary international law principles including *jus cogens* norms in formulating constitutional provisions on different issues, particularly in shaping the contents of fundamental human rights under part III. The international customs-driven constitutional provisions involve the statements of right to life, prohibition of torture, cruel and inhuman or degrading treatment and punishment, prohibition of forced labour, right to equality and non-discrimination, right to fair trial, right to equal access to public service, principle of non-retroactivity of law, and freedom-oriented rights. Most of these fundamental rights assume the status of *jus cogens* norms having *erga omnes* (towards all) effect.

Apart from fundamental right-induced principles, the customary principles have also been pursued in constructing some fundamental state policies such as people's participation in the government and the protection and improvement of healthy environment. From the miscellaneous part of the Constitution, the state ownership of natural resources is very much based on the idea of customary norms of state sovereignty over natural resources established by the UN General Assembly Resolution 1803. In the backdrop of all these, it could be fairly said that the content-specific recognition of relevant customary principles in rulemaking of the Constitution is a clear proof of Bangladesh's position of accepting or respecting the generally recognised international law principle leading to the right-based and people-participated democratic republic.

⁸⁰ *Texaco Overseas Petroleum Company v The Government of the Libyan Arab Republic* (1977) YCA 53 ILR 389.

⁸¹ Yoshofumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2019) 102.

⁸² *ibid.* 172.

References

Chapters in Edited Books

- Hart, Vivian. 2010. Constitution Making and the Right to Take Part in a Public Affairs. In *Framing the State in Times of Transition*, ed. L.E. Miller and L. Aucion, 20. Washington, DC: US Institute of Peace.
- Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. *Customary International Law*. Cambridge: Cambridge University Press.
- Oda, Shigeru. 1982. *The Practice of Japan in International Law*. Tokyo: University of Tokyo Press.
- Schabas, William A. 2021. *The Customary International Law of Human Rights*. Oxford: OUP.
- Shaw, Malcom N. 2014. *International Law*. Cambridge: Cambridge University Press.
- Visser, F. 1988. *The Principle of Permanent Sovereignty over Natural Resources and the Nationalisation of Foreign interests*. Moraga: Catholic Institute for Lasallian Social Action.

Articles

- Charlesworth, Hilery. 2017. International Legal Encounters with Democracy. *Global Policy* 8 (1): 34.
- Chekera, Yolanda T., and Vincent O. Nmechille. 2013. The International Law Principle of Permanent Sovereignty over Natural Resources as an Instrument for Development: The Case of Zimbabwean Diamonds. *African Journal of Legal Studies* 6: 69.
- Gess, Karol N. 1964. Permanent Sovereignty over Natural Resources: An Analytical Review of the UN Declaration and its Genesis. *International & Comparative Law Quarterly* 13 (2): 398.
- Iwasawa, Y. 1993. The Relationship Between International Law and National Law: Japanese Experiences. *British Yearbook in International Law* 64: 333.
- Stein, Eric. 1994. International Law in Internal Law: Towards Internationalization of Central-Eastern European Constitutions? *American Journal of International Law* 88 (3): 427.

Documents

- American Law Institute. 1987. *Restatement (3rd) of the Foreign Relations Law of US*. St. Paul: American Law Institute.
- Inter-American Court of Human Rights (Advisory Opinion), Juridical Condition and Rights of Undocumented Migrants 2003.
- Report of the Special Rapporteur on the Rights of Indigenous Peoples 2020.
- The African Charter on Human and People's Rights 1981.
- The American Convention on Human Rights 1969.
- The Convention 29 Concerning the Abolition of Forced Labour 1946.
- The Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment 1984.
- The Convention on the Elimination of All Forms of Discrimination against Women, 1979.
- The European Convention on Human Rights 1950.
- The Four Geneva Conventions 1949.
- The International Covenant on Civil and Political Rights 1966.
- The Reports of International Law Commission, Seventy First Session 2019.
- The Universal Declaration of Human Rights 1948.

Tladi, Dire (Special Rapporteur) Forth Report on peremptory norms of general international law (jus cogens) 2019.

Internet Sources

- General Comment No. 25. 1996. The Right to Participate in Public Affairs, Voting Rights and Right to Equal Access to Public Affairs. <https://www.equaltrust.org>. Accessed 15 Mar 2022.
- Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Process. 2009. [https://www.un.org/rule of law/blog/document/guidance-note-of the secretary-general-united-nations-assistance-to-constitution-making process Final.pdf](https://www.un.org/rule%20of%20law/blog/document/guidance-note-of-the-secretary-general-united-nations-assistance-to-constitution-making-process-Final.pdf). Accessed 20 Mar 2022.
- Helfer, Laurence H. 2015. *The Limited Relevance to Customary International Law to Judicial Review of National Legislation and Executive Decision*. (Draft Paper of Duke-Japan Conference on Comparative Foreign Relations Law. https://law.duke.edu/sites/default/files/centers/cicl/helfer_cil_papers_for_japan_conference.pdf. Accessed 22 Mar 2022.
- Saunders, Cheryl. 2020. *Constitution and International Law (International Institute for Democracy and Electoral Assistance)*. <http://constitutionnet.org/myconstitution-myanmar>. Accessed 1 Mar 2022.

Nakib M Nasrullah is a Professor of Law at the University of Dhaka. He obtained his PhD in international investment law from Macquarie University, Australia. His major published works include a co-authored book *CSR in Private Enterprises in Developing Countries: Evidences from the Ready-Made Garments Industry in Bangladesh* (Springer 2014) and the book chapters such as 'Corporate Social Responsibility Implementation in the EU and the USA: The Trend and The Way Forward' (Springer, Berlin/Heidelberg, 2013); 'Turkey's Role in GCC through Bilateral Investment Treaties' (Gulf Research Centre Cambridge, 2015); 'The Application of International Humanitarian Law by the International Crimes Tribunal of Bangladesh' (Cambridge, 2019) and 'Revisiting the Geneva Conventions' (Brill Nijhoff, 2019). Professor Nasrullah is a member of editorial board of Manchester Journal of Transnational Islamic Law and Practice, and American Society of International Law, and a listed reviewer of updated commentary of Fourth Geneva Convention (an ongoing project of ICRC Geneva).

Chapter 6

Constitutional Changes in Bangladesh: Underscoring the Need for Public Participation in the Process



Naveed Mustahid Rahman

Abstract As constitutional change is a political phenomenon, an examination of this topic can benefit from combining doctrinal analyses with the study of amendment-politics. Paying due attention to the political context, this chapter explores 50 years of constitutional change relating to democracy and secularism, two of the four fundamental principles on which Bangladesh was founded. This examination demonstrates that public participation in the process of constitutional change have been limited, giving rise to questions regarding its democratic legitimacy. The basic structure doctrine introduced by the Supreme Court and adopted by Parliament through an eternity clause in the 15th Amendment is given special attention as it further limits people's participatory and deliberative opportunities in the constitutional development of Bangladesh. This chapter calls for reform of this clause and the introduction of a reformed system of referendums to ensure greater democratic participation and augment the legitimacy of constitutional changes.

Keywords Amendment process · Public participation · Democracy · Secularism · Legitimacy · Basic structure · Eternity clause · Reforms · Referendum

6.1 Introduction

In the 50 years of the Constitution entering into force, Bangladesh has undergone many contrasting regimes, including two military-bureaucratic regimes, back and forth between parliamentary and presidential systems of government, radical innovations and backtracking in its electoral practice, and an unelected caretaker government borne from the electoral innovation that ruled for 2 years. As most of

N. M. Rahman (✉)

Department of Philosophy, University of Missouri-Columbia, Columbia, MO, USA

Eastern University, Dhaka, Bangladesh

e-mail: naveedm.rahman@gmail.com

this turmoil reflects upon its constitutional practice, to study the 17 amendments to the Constitution passed so far is to examine Bangladesh's troubled past and legacy.

This chapter explores this complex constitutional journey by analysing changes relating to democracy and secularism, two of the four fundamental principles on which the country was founded. The relevant observation here is that the erratic changes to the fundamental principles are correlated with inadequate levels of public participation in the constitutional process. The correlation can be considered representative, supported by Hoque's finding that 'constitutional amendments in Bangladesh are extremely deficient in public participation and deliberation'.¹ Constitutional change in Bangladesh thus suffers from a legitimacy crisis, as these are 'the two normative desiderata of legitimate constitutional change'.² Raymond Ku argues

[C]onstitutional change is legitimate only when it commands the unanimous support of the people, or, because unanimous support is practically impossible, when it is accomplished through procedural devices (i.e., representation, ratification, and supermajority support) that safeguard minority interests in an effort to determine the public good and approximate the will of the people as a whole.³

Following this reasoning, this chapter calls for procedural changes that increase people's participation and deliberation in processes of constitutional change.

Unlike most of its South Asian peers, Bangladesh has a unitary government and unicameral parliament; hence constitutional amendments do not need to be assented by several Houses of Parliament or State Legislatures. Article 142 only requires the assenting votes of two-third of the members of Parliament to pass amendments, and coupled with a strong parliamentary anti-defection provision, it gives any leader of the House commanding the requisite majority decisive authority over constitutional change. These amendment-powers have been frequently abused in the past 50 years. However, instead of addressing the balance of powers in the constitutional design and correcting other democratic deficits in the Constitution, the eternity-clause inserted in 2011 entrenches them for all time. The better constitutional response to the abuse of amendment-powers could be expanding people's participatory and deliberative opportunities in constitutional developments. This chapter thus calls for a revision of the scope of the eternity clause and introducing reformed procedures of referendums on constitutional amendments. Referendums could also work as a

¹Ridwanul Hoque, 'Deconstructing Public Participation and Deliberation in Constitutional Amendment in Bangladesh' (2021) 21(2) *Australian Journal of Asian Law* 8–16.

²*ibid.* 21.

³Raymond Ku, 'Consensus of the Governed: The Legitimacy of Constitutional Change' (1995) 64 *Fordham Law Review* 539–40. Contiades and Fotiadou, discussed below, identify three sources of legitimacy for amendments. This chapter, following Ku and Kasfir, argues public participation and deliberation is the most important source of legitimacy for constitutional amendments in Bangladesh. See also Yaniv Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures' in Richard Albert, Xenophon Contiades and Alkmene Fotiados (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017b) 26–31.

balancing tool to the comparatively flexible amendment-regime. Apart from correcting the deficit in the legitimacy of constitutional changes and the unstable constitutionalism of the past 50 years, this could also contribute to the consolidating of democracy in Bangladesh, which would in turn restrict undemocratic interferences into the Constitution. Hence, the interrelations between increasing public participation in constitutional processes and strengthening democratic institutions are stressed in this chapter.

6.2 Public Participation and Amendments to Democracy and Secularism

According to Contiades and Fotiadou, constitutional amendments may draw legitimacy ‘from the procedures followed, the actors involved, or the substantive content of the amendment’.⁴ As article 7(2) states the Constitution is the will of people and article 142 provides secondary or constituted constituent powers, this chapter submits that the legitimacy of constitutional changes in Bangladesh must depend on people’s involvement in the amendment-processes. It appears that while the issues of substantive content and conforming to procedural requirements are related to the legality of amendments, which certainly bears upon its legitimacy, it does not fulfill the separate normative requirement of public participation. The power of amendments in the Constitution is not unlimited as to substantive changes, as these cannot infringe upon the basic structure provisions entrenched by the Constitution itself. Regarding procedural correctness, this chapter calls for the introduction of referendums in a bid to make the constituent powers more *demanding* rather than *facile*, borrowing Yaniv Roznai’s framework.⁵ In sum, while the legality of amendments enacted duly following constitutional requirements renders them some legitimacy, it is not complete or adequate without people’s participation and deliberation in the processes.

This chapter adopts a simplified conceptualisation of the processes of public participation and deliberation. Public participation in constitutional change can be effected directly through referendums and less directly through general elections if the proposed changes to the Constitution are clearly publicised beforehand.⁶ Limited and indirect public participation can also be exercised through judicial review of constitutional amendments.⁷ On the other hand, public deliberation includes submitting amendment bills for eliciting public opinion, soliciting views from civil

⁴Xenophon Contiades and Alkmene Fotiadou, ‘The Emergence of Comparative Constitutional Amendment as a New Discipline: Towards a Paradigm Shift (Conclusion)’ in Albert (n 3) 383.

⁵Roznai (n 3) 23–49.

⁶Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017) 15.

⁷Hoque (n 1) 9.

societies, forming parliamentary committees to discuss and propose the bills, formal and quasi-formal discussions among political parties, and also parliamentary discussions on amendment-bills. Bangladesh's constitutional practice has been deficient in all these respects, as the following discussions relating to democracy and secularism demonstrate.

6.2.1 Democracy

The First Amendment to the Constitution in 1973 provided for the trial of individuals accused of international crimes committed during Bangladesh's war of independence in 1971 and restricted certain constitutional rights of persons so accused.⁸ The 2nd Amendment passed in the same year paved the way for enacting laws, although not constitutional bills, that are inconsistent with fundamental rights by inserting clauses in articles 26 and 142. It also empowered Parliament to pass laws on preventive detention by substituting article 33, and incorporated emergency provisions for the first time by inserting part IX-A in the Constitution.⁹ These changes, particularly relating to articles 26 and 142, continue to threaten democratic rights in Bangladesh and Hoque questions whether this change was within the scope of Parliament's constituent powers.¹⁰ Notably, public opinion was not elicited before the enactment of this Amendment, even after opposition parties in Parliament had specifically demanded it.¹¹ The Parliamentary Rules of Procedure allows legislative bills to be circulated for eliciting public opinion,¹² but no amendment-bills have been submitted for this purpose in the country's history.¹³

Democracy in Bangladesh was further eroded by the 4th Amendment passed in 1975. It substituted the parliamentary system of government by a presidential one.¹⁴ This Amendment thus altered the founding features of the Constitution from the parliamentary to presidential form of government without public deliberation.¹⁵ Sheikh Mujibur Rahman, the first elected prime minister, thus became the President, but his government was overthrown by a military coup in mid-August 1975.¹⁶

⁸The Constitution (First Amendment) Act, 1973, Act No. XV of 1973.

⁹The Constitution (Second Amendment) Act, 1973, Act No. XXIV of 1973.

¹⁰Hoque (n 1) 12.

¹¹Kazi Zahed Iqbal, *Bangladesher Shongbidhan Shongshodhoni 1972–1988: Prekkhapot O Porjalochona* (in Bengali language, Dhruvopod, Dhaka 2016) 51–53.

¹²Rule 77(d) of the Rules of Procedure of Parliament, <http://www.parliament.gov.bd/images/pdf/Rules_of_Procedures_English.pdf> accessed 30 June 2022.

¹³Hoque (n 1) 11–18.

¹⁴The Constitution (Fourth Amendment) Act, 1973, Act No. II of 1975.

¹⁵Dilara Choudhury, *Constitutional Developments in Bangladesh: Stresses and Strains* (University Press Ltd., Dhaka, 1995) 45.

¹⁶Ali Riaz, *A Political History Since Independence* (International Library of twentieth Century History Collections, IB Tauris 2016) 58.

General Ziaur Rahman emerged as the Martial Law Administrator of the country, formed his own political party and constituted Parliament through a state-managed election that enacted the 5th Amendment in 1979 to validate the military rule and his interferences into the Constitution by decrees since 1975.¹⁷ It attempted to legitimate the abrogation of the one-party system while retaining the presidential form of government, as well as changes to fundamental principles of the State brought by Martial Law Proclamation and Decrees.¹⁸ His rule ended through a second military coup in 1983. General H M Ershad usurped power 1 year later and formed another party and again staged an election in 1986 to validate his military rule through the 7th Amendment.¹⁹ The 5th and 7th Amendments were later declared 'unconstitutional' by the Supreme Court, whereas 4th Amendment escaped judicial review, as it had been largely repudiated by subsequent amendments. All these Amendments were therefore passed by the elite political actors by taking advantage of article 142 and all radically altered the fundamental features of the State, without any direct or indirect public participation and deliberation.²⁰

General Ershad was ousted by a popular uprising in 1991 and the 11th Amendment was enacted to facilitate the transition from military-bureaucratic presidential rule to parliamentary democracy, by appointing the then Chief Justice as the Vice-president to conduct elections.²¹ The parliamentary system of government was then restored through the 12th Amendment.²² Notably, this reversion to parliamentary democracy and related constitutional issues was agreed upon by the major political parties, Bangladesh Nationalist Party (BNP) and Bangladesh Awami League (BAL), through a 15-member Parliamentary Committee.²³ After the proposed bill was passed in Parliament, it was ratified in a nationwide referendum.²⁴ This is the only formal Amendment in Bangladesh that saw significant and direct public participation. A process of referendums for the preamble and certain constitutional provisions was first introduced by the 5th Amendment²⁵ and later modified by the 12th Amendment, which omitted few provisions from its ambit. The referendum was later struck down by the Supreme Court in the *Italian Marbles decision*.²⁶ However, neither the High Court Division (HCD) nor the Appellate Division (AD)

¹⁷ The Constitution (Fifth Amendment) Act, 1979, Act No. I of 1979.

¹⁸ Riaz (n 16) 72.

¹⁹ *ibid.*; also The Constitution (Seventh Amendment) Act, 1986, Act No. I of 1986.

²⁰ Choudhury (n 16) 45.

²¹ The Constitution (Eleventh Amendment) Act, 1991, Act No. 24 of 1991.

²² Riaz (n 167) 76–77; also: The Constitution (Twelfth Amendment) Act, 1991, Act No. 28 of 1991.

²³ Hoque (n 1) 16.

²⁴ M Moniruzzaman, 'Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament during 1991–2006' (2009) 47(1) *Commonwealth & Comparative Politics* 100–26.

²⁵ Clause 1A was first inserted to article 142 by the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order no IV of 1978) and legitimated later by the 5th Amendment.

²⁶ *Khondker Delwar Hossain v Italian Marble Works*, Civil Petition Leave to Appeal No. 1044 and 1045 of 2009, 123–25.

of the Supreme Court dealt with the substantive issues relating to referendums in their judgments while striking it down.²⁷

The next constitutional development of great and enduring significance was the introduction of the caretaker-government (CTG) system, which came after the tenure of the Bangladesh Nationalist Party (BNP) government ended in 1996.²⁸ Bangladesh Awami League (BAL) alleged widespread vote-riggings and refused to participate in an election conducted by the incumbent party.²⁹ BNP won an almost uncontested-election in 1996, but later gave into the mounting political pressure by BAL and other opposition parties as well as the civil society and instituted the caretaker government system through the 13th Amendment.³⁰ However, 'it was adopted in a Parliament without an opposition or through any parliamentary committees and without dialogues with the civil society or other stakeholders.'³¹ Khan argues that this resulted in several weaknesses in the CTG.³² Thus, public deliberation in the process of this Amendment was limited, even though the CTG garnered cross-party and popular support.³³ The CTG, to be headed by the last-retired Chief Justice, was tasked with conducting free and fair elections within 90 days of assuming office and handing over government to the elected representatives of the people.³⁴

At the end of the BNP government tenure in 2006, Bangladesh was again enmeshed in political turmoil over the composition of the Election Commission and CTG. The BNP government installed a President-led CTG flouting prior constitutional requirements.³⁵ The military intervened and instituted a different CTG in early 2007,³⁶ putting democracy in an indefinite hiatus once again. This 'caretaker government' handed over the reins 2 years later through the general election of 2008, in which BAL came to power with a super-majority. Following the Court's declaration of the 13th and 5th Amendments as 'unconstitutional', the BAL

²⁷ It would have been logical for them to evaluate referendums substantively, as they had done with similar insertions of the 5th Amendment, such as the Supreme Judicial Council, which it retained; *ibid.* 177.

²⁸ Riaz (n 16) 77–80.

²⁹ *ibid.* 77–80.

³⁰ *ibid.* 77–80; also, Adeeba A Khan, 'The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-political Caretaker Government' (2015) 9(1) *International Review of Law* 6–7.

³¹ Khan, *ibid.* 6.

³² *ibid.*; Ali Riaz, 'Bangladesh in Turmoil: A Nation on the Brink? Testimony before the Subcommittee on Asia and the Pacific Committee on Foreign Affairs', United States House of Representatives, <<https://docs.house.gov/meetings/FA/FA05/20131120/101512/HHRG-113-FA05-Wstate-RiazA-20131120.pdf>> accessed 26 July 2022.

³³ Hoque (n 1) 16–17.

³⁴ The success of the interim government headed by the Chief Justice that conducted the 1991 election played a role in giving rise to the demand of making a Chief Justice-headed caretaker government a permanent electoral feature.

³⁵ Khan (n 30) 7.

³⁶ Riaz (n 16) 84–87.

government passed the 15th Amendment in 2011 which scrapped the CTG system, omitted the referendum provision among other major changes such as returning the fundamental principles of the State to the 1972 original Constitution, and inserted an eternity clause.³⁷ Incidentally, it was passed without a referendum, which was still in effect at the time of its adoption.³⁸

A Parliamentary Select Committee was formed to deliberate on the proposed Amendment.³⁹ However, it did not have any members from the BNP. BNP was invited to attend the meetings of the Committee, but it refused calling it a 'farce'.⁴⁰ The Committee met with civil society members, various political parties, prominent lawyers, and former Chief Justices, a first in Bangladesh.⁴¹ The Committee's recorded position in its 14th meeting was that notwithstanding its problems, the CTG should be retained.⁴² However, the Supreme Court's short judgment on the 13th Amendment was released declaring the CTG unconstitutional for not conforming to democracy and the basic structure of the Constitution.⁴³ The Committee then reportedly met with the prime minister, and soon after, released their final proposal, which now called for the scrapping of the CTG, contradicting its deliberations on record, and also without waiting for the final judgment to be released after they had agreed to do so in its 24th meeting.⁴⁴ Therefore, there was limited and indirect public *deliberation* on the 15th amendment through a parliamentary committee. The government passed the 15th Amendment scrapping the CTG.

The stated *political* reason for repealing the CTG in 2011 was the experiences of 2007–2008 when the military-backed CTG overran the political system, put both leaders of BAL and BNP behind bars, and far exceeded its mandate.⁴⁵ However, BNP still directs much of its energy in trying to mobilise the people based on the claim that the CTG is the only way to ensure free and fair elections in Bangladesh.⁴⁶ BAL has remained in power since its election victory in 2008, through an uncontested

³⁷ The Constitution (Fifteenth Amendment) Act, 2011, Act No. 14 of 2011.

³⁸ Hoque argues that this was not constitutional as the voiding of 5th Amendment cannot affect referendums, which was later confirmed in the 12th Amendment; Ridwanul Hoque, 'Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and For All?' in Richard Albert and Bertil E Oder (eds), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (Springer 2017) 200.

³⁹ Khan (n 30) 12.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.* 12–13.

⁴³ Hoque (n 1) 13–14.

⁴⁴ *ibid.* 14.

⁴⁵ See 'Bangladesh Ends Caretaker Government Arrangement,' *BBC News*, 30 June 2011, <<https://www.bbc.com/news/world-south-asia-13973576>> accessed 30 June 2022.

⁴⁶ See Mohammad Al Masum Molla, 'BNP Shoring itself Up for Movement' *The Daily Star*, Dhaka, 9 January 2022, <<https://www.thedailystar.net/news/bangladesh/politics/news/bnp-shoring-itself-movement-2935041>> accessed 27 Jan 2022.

election in 2014, which BNP boycotted because of the scrapping of the CTG.⁴⁷ BNP did participate in the most recent election in 2018, the second conducted by the incumbent BAL, but this election was criticised as being state-managed by independent election observers.⁴⁸ Regardless of whether the CTG is reinstated, it is unquestionable that Bangladesh needs stronger and more independent electoral institutions for its democracy to function and thrive.

6.2.2 *Secularism*

General Zia omitted ‘Secularism’ as a fundamental principle of the State and replaced it with ‘Absolute trust and faith in the Almighty Allah’ and inserted ‘*Bismillahir Rahmanir Rahim*’ (in the name of Allah, the most merciful) above the Preamble through the Martial Law Proclamation, and later legitimated it through the 5th Amendment in 1979.⁴⁹ General Ershad made Islam the ‘state religion’ of Bangladesh through the 8th Amendment in 1988, though confusion remains as to what it means or entails. This Amendment was passed towards the end of Ershad’s rule, when the popular movement against his regime was gaining high momentum.⁵⁰ Military or autocratic leaders are known to use religion to appeal to sections of the people to boost their popularity and strengthen their hold of power.⁵¹

The 8th Amendment was challenged by leading Dhaka-based lawyers for violating the ‘basic structure’ of the Constitution, as it incidentally provided for the establishment of six permanent-benches of the HCD of the Supreme Court outside the capital, and the Court agreed.⁵² Although a major part of the 8th amendment, the judgment avoided the issue of the incorporation of Islam as the state religion of the country. Their reason could be that at that juncture, secularism was not the fundamental principle of the state.⁵³ However, the avoidance to deal with and

⁴⁷ *ibid.* 89–91.

⁴⁸ Ali Riaz and Saimum Parvez, ‘Anatomy of a Rigged Election in a Hybrid Regime: The Lessons from Bangladesh’ (2021) 28(4) *Democratization* 801–20.

⁴⁹ Hoque (n 38) 205.

⁵⁰ Riaz (n 16), 77–78.

⁵¹ Md Ziaul Haque Sheikh and Zahid Shahab Ahmed, ‘Military, Authoritarianism and Islam: A Comparative Analysis of Bangladesh and Pakistan’ (2020) 13(2) *Politics and Religion* 333–60.

⁵² *Anwar Hossain Chowdhury Vs. Bangladesh*, 1989, 18 CLC (AD).

⁵³ However, on 28 March 2016, the HCD summarily rejected the writ petition challenging the constitutionality of keeping Islam as the state religion. Without getting into the merits of the case, the HCD held that the petitioners lacked *locus standi* to bring the cause to the court. See Ridwanul Hoque, ‘Constitutional Challenge to the State Religion Status of Islam in Bangladesh: Back to Square One?’ (*Blog of the International Journal of Constitutional Law*, 27 May 2016) <http://www.iconnectblog.com/2016/05/islam-in-bangladesh/#_ftnref4> accessed 8 November 2022; UNB Dhaka, ‘Islam to stay state religion as HC rejects writ’ *Prothom Alo* (Dhaka, 2 April 2016) <<https://en.prothomalo.com/bangladesh/HC-rejects-writ-challenging-Islam%E2%80%99s-state-religion>> accessed 8 November 2022.

comment on this issue while discussing basic features of the Constitution is telling, as the Court left two petitions specifically challenging the state religion unheard at the same period.⁵⁴ Whereas Justice Ahmed wrote that the 5th and 7th Amendments were part of the Constitution, Chowdhury has noted that Justices Chowdhury and Rahman had gone to the extent of *implying* that these changes brought by the two military usurpers through compromised Parliaments and later voided by the same Court, was part of the basic structure.⁵⁵ This can be an argument against leaving the province to say what the basic structure is solely to the judicial organ of the state.

The BAL government largely restored the Constitution to its original 1972 shape through the 15th Amendment in 2011 but retained Islam as the state religion as well as '*Bismillahir Rahmanir Rahim*'.⁵⁶ However, this Amendment added a qualification in article 2A: 'The state religion of the Republic is Islam, but the State shall ensure equal status and equal right in the practice of the Hindu, Buddhist, Christian and other religions'. This is self-contradictory as Islam is evidently given elevated status by being made the state religion, a mandatorily enforceable provision with superseding effect when it comes into conflict with the apparent non-enforceable state policy of secularism. The 15th Amendment had little *legal* rationale of retaining the state religion which had already been repudiated by the Court,⁵⁷ and especially after it had reinstated secularism as a fundamental principle of the state. But now this cannot be addressed any longer because of the insertion of the eternity clause by article 7B through the same Amendment. This clause is discussed in the following section along with the necessity of increasing public participation in constitutional processes of the country.

6.3 Augmenting Public Participation in the Constitutional Processes

The previous part has demonstrated that public participation in Bangladesh's constitutional changes has been deficient.⁵⁸ This section calls for increasing public participation and deliberation in constitutional processes for augmenting its legitimacy and submits that it could also play a role in discouraging extra-constitutional incursions into the Constitution and government. The insertion of a referendum provision and curtailing the scope of the eternity clause are the two recommendations forwarded below in this regard.

⁵⁴ Rokeya Chowdhury, 'From 'Secular' to 'Islamosecular' Bangladesh: Mapping the Constitutional Trajectories through Law, Religion, and Performing Arts.' (PhD thesis, McGill University 2021) 192–93.

⁵⁵ *ibid.* 194–95.

⁵⁶ The Constitution (Fifteenth Amendment) Act, 2011, Act No. XIV of 2011.

⁵⁷ *Khondker Delwar Hossain v Italian Marble Works* (n 27) 123–25.

⁵⁸ Hoque (n 1) 8–16.

6.3.1 *Referendums*

According to Roznai, the amendment power is situated in a grey area between ordinary legislative power (constituted power) and extraordinary constituent power.⁵⁹ He further distinguishes between *facile* and *demanding* amendment powers within this gray area.⁶⁰ The more similar amendment procedures are to enacting ordinary legislation, the more *facile* they are. The most *facile* amendment powers are those in which a simple legislative majority is able to adopt constitutional amendments. It is argued that although the original amendment provision in the Constitution requires a qualified two-third majority, Bangladesh's unique constitutional design still makes it extremely *facile*. The unicameral parliament and unitary form of government make the government of Bangladesh more concentrated at the center than most of its South Asian peers. The adoption of constitutional amendments in Bangladesh does not need the approval of several Houses of Parliament or constituent states. As article 70 strictly prohibits floor-crossing by Members of Parliament, any prime minister commanding two-third majority in Parliament has decisive authority over passing amendments, whether they were sanctioned by the people through free and fair elections or not, subject only to the eternity clause inserted in 2011. The amendment-rule also does not require 'multiple readings in Parliament, time delays between the initiative and the first debate in Parliament or between the readings,' which are additional features that Roznai identifies as making the amendment power more '*demanding*'.⁶¹ Significantly, all these procedures are still '*facile*' from the perspective of a democratic constituent power as they exclude the *people* from the process.⁶²

As Roznai's basic argument is that '*demanding* amendment powers should be awarded wider scope than *facile* amendment power', he calls for the inclusion of referendums and other procedures as checks on amendment-powers.⁶³ Advantages and disadvantages of referendums are contested in the literature. However, there is scarce disagreement that the constitutional provision of referendum lends more legitimacy to constitutional change by providing avenues for greater public participation.⁶⁴ Key concerns with referendums relate to the possibility of majoritarian abuse and 'elite manipulation', i.e. abuse by populist or other elite political actors to incorporate problematic provisions in the Constitution, such as curtailing minority rights or extending Executive's power or tampering with

⁵⁹ Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Limits of Amendment Powers* (OUP 2017a).

⁶⁰ *ibid.* 37–38.

⁶¹ *ibid.* 38.

⁶² *ibid.* 38.

⁶³ *ibid.* 39.

⁶⁴ Stephen Tierney, *Constitutional Referendums: The theory and practice of republican deliberation* (OUP 2012) 302; David Altman, *Direct democracy worldwide* (Cambridge University Press 2011) 197; Roznai (n 3) 41–6.

electoral procedures etc., as has happened in Bangladesh.⁶⁵ However, detailed regulations as to referendums can effectively counter ‘elite manipulation’.⁶⁶ The entrenchment of fundamental human rights and other key features of the State, putting it outside the scope of amendments also mitigate associated risks. Moreover, Levy, in a data-driven work, demonstrates that the ‘elite problem’ in deliberative democracy is largely due to preconceived ideas prevalent among the elite, and none of the ‘elite problems’ are intractable.⁶⁷

This chapter’s key argument is that due to the character of the amendment-rule in Bangladesh described above, referendum is necessary for providing an additional layer of security for constitutional changes, apart from increasing its legitimacy by extending people’s opportunities of meaningful participation in the processes of amendments.⁶⁸ Additionally, this increase in public participation and deliberation, in an effort to move towards direct democratic actions, can in turn discourage extra-constitutional interferences into the Constitution and play a part in strengthening democracy in Bangladesh. Referendums can function as a check over the executive power in constitutional change due to the increase in public participation it entails.⁶⁹ Roznai writes

Since a demanding amendment process is meant to be an inclusive, deliberative, and time-consuming, the referendum should be an additional platform to the political process, perhaps together with a special constituent assembly. The risk of abuse of the amendment power rises especially with *facile* amendment powers, where the amendment body is the same body that decides the everyday political decisions.⁷⁰

This is especially relevant for the *facile* amendment powers in Bangladesh that have been frequently abused by majoritarian and military powers which by design controls both the Legislature and Executive when in power.

6.3.2 *Eternity Clause*

Instead of augmenting public participation in constitutional change through referendums and other processes, the response to the majoritarian abuse of constitutional amendments has been to entrench the Constitution by an eternity

⁶⁵ Eoin Carolan, ‘Participatory Constitutional Change: Constitutional referendums’ in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020) 186; Contiades and Fotiadou (n 6) 16.

⁶⁶ Contiades and Fotiadou (n 6) 3; Matt Qvortrup, ‘The Rise of Referendums: Demystifying Direct Democracy’ (2017) 28(3) *Journal of Democracy* 141–52.

⁶⁷ Ron Levy, ‘The ‘Elite Problem’ in Deliberative Constitutionalism’ in Ron Levy and others (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press 2018).

⁶⁸ Carolan (n 65) 185.

⁶⁹ Eoin Daly, ‘A Republican Defence of the Constitutional Referendum’ (2015) 35(1) *Legal Studies*, 30–54; Roznai (n 3) 44.

⁷⁰ Roznai (n 3) 37–38.

clause, whereas no article or part of the Constitution had been made unamendable by the original amendment-rule in article 142. Taken with the constitutional design of unicameral parliament and unitary government, the foundational position on constitutional change was therefore comparatively flexible. There can plausibly be parts or features of the Constitution that the framers considered as being basic and intended to be unamendable,⁷¹ but no clear indication or instructions to this effect was provided in the original Constitution nor can guidance be found in this area from the Constituent Assembly debates.

The Supreme Court invalidated the 8th Amendment based on the basic structure doctrine in the *Anwar Hossain Chowdhury* case and identified parts or features of the Constitution as basic.⁷² It is debatable if the pronouncement of basic features of the Constitution, making them eternally unamendable by democratic processes through the Legislature, is within the scope of judicial review granted by the Constitution. Jashim Ali Chowdhury notes that the Court had promoted its own independence over competing governance principles like judicial accountability and separation of powers while providing its vision of the basic structures of the Constitution.⁷³ It can be an argument against leaving the basic structures of the State to be decided upon solely by the Court, as they necessarily involve fundamentally *political* questions. However, the Legislature later entrenched the basic structure doctrine itself while magnifying its scope through article 7B by the 15th Amendment. An object of this Amendment was to restore the Constitution to its original form, but article 7B was of course not present in 1972. As the framers of the Constitution expressly adopted a comparatively *facile* amendment-regime covering all provisions of the Constitution, it is extremely unlikely they intended such a broad conceptualisation of permanent entrenchment.⁷⁴ To avoid a clear and fatal textual conflict with article 142, article 7B needed to incorporate a *non-obstante* clause, making the point regarding the intention of the framers more poignant.

Even if the broad permanent entrenchment could have *legitimately* been made by the constituent powers of Parliament, it should at the least be mandated as such by the people, as the legitimacy of constitutional change comes through democratic participation, and not solely by following procedural formalities.⁷⁵ However, even in such a case, it is debatable whether the existing populace can limit the will of all future people for an eternity. Article 7B is also not in consonance with other aims and features of the Constitution that has been recognised as fundamental principles, such as its permanent bar on making any socio-economic right justiciable to advance

⁷¹ Hoque (n 38) 204.

⁷² *Anwar Hossain Chowdhury v Bangladesh* (n 52) [416].

⁷³ M Jashim Ali Chowdhury, and Nirmal Kumar Saha, 'Amendment Power in Bangladesh: Arguments for the Revival of Constitutional Referendum' (2020) 9 *Indian Journal of Constitutional Law* 50–51.

⁷⁴ Hoque (n 38) 198: 'This, it is argued, has effectively turned the country's constitution from a living instrument to one that has become almost permanent, thereby retarding the sovereignty of people'.

⁷⁵ Hoque (n 1) 8.

the cause of socialism, correcting the inconsistencies between secularism and the state-religion and the confusion between Bengali and Bangladeshi identities in the reformulated article 6. The weaknesses in the institutional character of democracy such as the preventive-detention provision found in article 33 similarly cannot be addressed.⁷⁶ It is also questionable whether the anti-defection prohibitions in article 70, the Executive's control over the Judiciary in article 116 and the prime minister's excessive powers, all of which erode democratic quality of the State, can be improved upon now, as the clause mandates 'articles relating to the basic structures of the Constitution' shall not be amendable, but does not provide a list of such articles. Further, as BAL, which won the two-third majority in Parliament, did not publish its intention to incorporate this eternity clause in its election-manifesto, public participation regarding the introduction of this provision was patently lacking.⁷⁷ All these points combined bring its legitimacy as well as legality into question.

The basic structure doctrine could be defensible if its scope was more limited, protecting the fundamental rights of the citizens and the core features of the State,⁷⁸ and the rest left to the political wisdom of the people, whose sovereign will is recognised as the source of power of the Republic and government in article 7(2). The German basic law and the Brazilian Constitution offer useful case-studies in this regard. The German Basic Law only designates human dignity, federalism, and basic institutional principles describing Germany as a democratic and social federal state as non-infringeable by amendments⁷⁹ and the Brazilian eternity clause protects the federative form of State; the direct, secret, universal and periodic vote; the separation of the Government Powers; and individual rights and guarantees.⁸⁰ These could be used as a framework for reformulating article 7B. In this regard, the framework of 'constitutional escalator' advocated by Roznai, Richard Albert, David Landau among others can be helpful. This idea simply calls for providing more protection to the core parts of the democratic order and rights, making them harder to amend, whereas non-fundamental provisions are less rigorously protected, to allow for constitutional progress through democratic deliberation and participation.⁸¹ For Albert, '[t]o withhold from citizens the power of constitutional amendment is to

⁷⁶ Hoque (n 38) 216.

⁷⁷ The 2008 Election Manifesto of BAL <<https://www.albd.org/articles/news/31125/Election-Manifesto-of-Bangladesh-Awami-League,-9th-Parliamentary-Election,-2008>> accessed 27 January 2022.

⁷⁸ Hoque (n 38) 215, 222–23.

⁷⁹ Article 79(3) of the Basic Law of Germany <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html> accessed 30 June 2022.

⁸⁰ The Constitution of the Federative Republic of Brazil 1988, Title IV, Section VIII, article 60, paragraph 4.

⁸¹ Roznai (n 3) 40; David Landau, 'Abusive Constitutionalism' (2013) 47(1) *UC Davis Law Review* 189; Richard Albert, 'Constitutional Handcuffs' (2010) 42 *Arizona State Law Journal* 707–11; Richard Albert, 'The Expressive Function of Constitutional Amendment Rules' (2013) 59(2) *McGill Law Journal* 225.

withhold more than a mere procedural right. It is to hijack their most basic of all democratic rights.’⁸²

6.4 Conclusion

In Bangladesh, constitutional amendments have been used as a tool or instrument for seizing or legitimising power by the constitutional actors.⁸³ The ‘demos’, or we, the people have been disenfranchised in the country’s political processes, including the making of amendments to the Constitution involving crucial issues, whether during military or civilian democratic regimes. This is the most crucial factor that stands out in its first 50 years of constitutional practice. The solution to these crises of democracy is to strengthen it both institutionally and otherwise. In terms of the Constitution, it includes ensuring greater public participation in its constitutional practice and development. But the eternity clause inserted in 2011 further constrains public participation in constitutional processes.

This chapter calls for the curtailment of this clause and suggests the introduction of referendums for constitutional amendments. The solution to constitutional and political adventurism cannot be permanently barring all avenues for future development but enabling meaningful and active participation of the people themselves in the constitutional processes. The people can be trusted to make the right decisions in most cases, but *they* must be able to trust that their voices would be adequately heard and represented. For this to occur, elections and referendums need to be free and fair. This in turn can only happen if the public institutions, including the Election Commission, Judiciary, and law enforcing authorities can function independently and competently, ie when the rule of law is firmly established and entrenched. Hence, augmenting public participation in constitutional processes and strengthening democratic institutions are fundamentally interrelated and rewarding for the effective operation of constitutional rule of law in Bangladesh.

References

Books

- Altman, David. 2011. *Direct Democracy Worldwide*. Cambridge: Cambridge University Press.
- Choudhury, Dilara. 1995. *Constitutional Developments in Bangladesh: Stresses and Strains*. Dhaka: University Press Ltd.
- Contiades, Xenophon, and Alkmene Fotiadou, eds. 2017. *Participatory Constitutional Change: The People as Amenders of the Constitution*. Oxon: Routledge.

⁸² Albert 2010, *ibid.* 663

⁸³ Khan (n 30) 2, 13, 15–16.

- Iqbal, Kazi Zahed. 2016. *Bangladesher Shongbidhan Shongshodhoni 1972–1988: Prekkhapot O Porjalochona* (in Bengali language, Dhrubopod, Dhaka).
- Levy, Ron. 2018. The ‘Elite Problem’ in Deliberative Constitutionalism. In *The Cambridge Handbook of Deliberative Constitutionalism*, ed. Ron Levy et al. Cambridge: Cambridge University Press.
- Riaz, Ali. 2016. *A Political History Since Independence*. London/New York: IB Tauris.
- Roznai, Yaniv. 2017a. *Unconstitutional Constitutional Amendments—The Limits of Amendment Powers*. Oxford: OUP.
- Tierney, Stephen. 2012. *Constitutional Referendums: The theory and practice of republican deliberation*. Oxford: OUP.

Chapters in Edited Books

- Carolan, Eoin. 2020. Participatory Constitutional Change: Constitutional Referendums. In *Routledge Handbook of Comparative Constitutional Change*, ed. Xenophon Contiades and Alkmene Fotiadou. Oxon: Routledge, ch 11.
- Hoque, Ridwanul. 2017. Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and For All? In *An Unconstitutional Constitution? Unamendability in Constitutional Democracies*, ed. Richard Albert and Bertil E. Oder, 200. Cham: Springer.
- Roznai, Yaniv. 2017b. Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures. In *The Foundations and Traditions of Constitutional Amendment*, ed. Richard Albert, Xenophon Contiades, and Alkmene Fotiadou, 26. Oxford: Hart Publishing.

Articles

- Albert, Richard. 2010. Constitutional Handcuffs. *Arizona State Law Journal* 42: 663.
- . 2013. The Expressive Function of Constitutional Amendment Rules. *McGill Law Journal* 59, 225 (2).
- Chowdhury, M. Jashim Ali, and Nirmal Kumar Saha. 2020. Amendment Power in Bangladesh: Arguments for the Revival of Constitutional Referendum. *Indian Journal of Constitutional Law* 9: 38.
- Daly, Eoin. 2015. A Republican Defence of the Constitutional Referendum. *Legal Studies* 35 (1): 30–54.
- Hoque, Ridwanul. 2021. Deconstructing Public Participation and Deliberation in Constitutional Amendment in Bangladesh. *Australian Journal of Asian Law* 21 (2): 8–16.
- Khan, Adeeba A. 2015. The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-political Caretaker Government. *International Review of Law* 9 (1): 5.
- Ku, Raymond. 1995. Consensus of the Governed: The Legitimacy of Constitutional Change. *Fordham Law Review* 64: 535.
- Landau, David. 2013. Abusive Constitutionalism. *UC Davis Law Review* 47 (1): 189.
- Moniruzzaman, M. 2009. Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament During 1991–2006. *Commonwealth & Comparative Politics* 47 (1): 100.
- Qvortrup, Matt. 2017. The Rise of Referendums: Demystifying Direct Democracy. *Journal of Democracy* 28, 141 (3).
- Riaz, Ali, and Saimum Parvez. 2021. Anatomy of a Rigged Election in a Hybrid Regime: The Lessons from Bangladesh. *Democratization* 28 (4): 801.
- Sheikh, Md Ziaul Haque, and Zahid Shahab Ahmed. 2020. Military, Authoritarianism and Islam: A Comparative Analysis of Bangladesh and Pakistan. *Politics and Religion* 13 (2): 333.

Internet Sources

- Bangladesh Ends Caretaker Government Arrangement. 2011. BBC News, 30 June 2011. <https://www.bbc.com/news/world-south-asia-13973576>. Accessed 30 June 2022.
- Hoque, Ridwanul. 2016. Constitutional Challenge to the State Religion Status of Islam in Bangladesh: Back to Square One?. *Blog of the International Journal of Constitutional Law*, 27 May 2016. http://www.iconnectblog.com/2016/05/islam-in-bangladesh/#_ftnref4. Accessed 8 Nov 2022.
- Molla, Mohammad Al Masum. 2022. BNP Shoring itself Up for Movement. *The Daily Star*, Dhaka, 9 January 2022. <https://www.thedailystar.net/news/bangladesh/politics/news/bnp-shoring-itself-movement-2935041>. Accessed 27 Jan 2022.
- Riaz, Ali. 2022. *Bangladesh in Turmoil: A Nation on the Brink? Testimony before the Subcommittee on Asia and the Pacific Committee on Foreign Affairs*. United States House of Representatives. <https://docs.house.gov/meetings/FA/FA05/20131120/101512/HHRG-113-FA05-Wstate-RiazA-20131120.pdf>. Accessed 26 July 2022.
- The 2008 Election Manifesto of BAL. 2008. <https://www.albd.org/articles/news/31125/Election-Manifesto-of-Bangladesh-Awami-League,-9th-Parliamentary-Election,-2008>. Accessed 27 Jan 2022.

Thesis

- Chowdhury, Rokeya. 2021. *From 'Secular' to 'Islamsecular' Bangladesh: Mapping the Constitutional Trajectories through Law, Religion, and Performing Arts*. PhD thesis, McGill University.

Naveed Mustahid Rahman is G. Ellsworth Huggins Graduate Fellow at the University of Missouri-Columbia. He previously taught at Eastern University and Bangabandhu Sheikh Mujibur Rahman Science and Technology University, Dhaka, Bangladesh. He has an MA in Political Science, specialising in political and social theory, from the Central European University and an LLM in International and Comparative Law from the University of Dhaka. His research interests intersect the fields of political and moral philosophy and comparative constitutional law.

Part II
Organs of the State, Constitutional
Institutions and Their Functions

Chapter 7

Role of Parliament in Ensuring Democratic Accountability in Bangladesh: Setting the Agenda for a Strengthened Parliamentary System



Abdullah Al Faruque

Abstract This chapter traces the evolution of the Parliament of Bangladesh over the last fifty years, highlights the role of parliament in ensuring democratic accountability in Bangladesh and recommends suggestions to strengthen the parliamentary system. While the adoption of law remains the primary function of parliament, it is also entrusted to ensure accountability of the government through the supervisory role of the parliamentary committees. But the parliamentary committees have remained largely dysfunctional in Bangladesh due to various reasons. This chapter (a) evaluates both the legislative and the supervisory role of parliament exercised through its standing committees; (b) sheds light on the barriers in ensuring individual accountability of the ministers, (c) assesses the extent to which both horizontal and vertical accountability is exercised by parliament; and (d) considers how far recommendations of the standing committees are considered by the government. It concludes with an examination of the lawmaking process and practice of parliament and a set of recommendation for strengthening the parliamentary system in Bangladesh.

Keywords Parliament · Democratic accountability · Parliamentary committees · Supervisory role · Ministerial responsibility · Floor-crossing · Ordinance endorsement · Reforms

7.1 Introduction

The political system of Bangladesh is based on the parliamentary form of government in which government remains accountable to the people through elected parliament. Such a system of government is derived from the Constitution of Bangladesh. The *Jatio Sangshad* (Parliament) is not only the highest lawmaking body in Bangladesh,

A. Al Faruque (✉)

Professor, Department of Law, University of Chittagong, Chittagong, Bangladesh
e-mail: faruquelaw71@yahoo.com

but it has also power to ensure executive accountability to parliament. Like many other countries which follow such a system, the Parliament in Bangladesh has the function of lawmaking, approving the expenditures for the public services, providing, and controlling the cabinet, ensuring accountability of the cabinet and individual ministers, controlling public finance, acting as a forum of deliberation and discussion, electing of the President and impeachment of the President. The effectiveness of a parliament depends on its representativeness, accountability, the participatory law-making process, high degree of interaction between its members and citizens, its oversight mechanism for monitoring public revenues and expenditures, and its capacity to address public grievances.¹

However, the Parliament of Bangladesh lacks many of the above criteria, and its law-making process is exclusionary in nature and public participation in the lawmaking process remains minimal which has been elaborated in the subsequent sections. The Parliament exercises its supervisory functions through its committees, parliamentary debates, public hearings, ministerial control, which are considered as some of the most crucial features of the democratic polity. The parliamentary committees are considered ‘mini legislature’, a required practice in the Westminster parliamentary form of government and have a great role to play in making the parliamentary system effective by monitoring the government activities and holding the various government agencies accountable. Engaging in discussion, deliberation, debating public issues, shaping, and influencing government’s policy and ventilating public grievances are also important elements of an effectively functioning Parliament.

During the fifty years of this constitutional body, Bangladesh has undergone military rule several times and fundamental changes had been introduced in the governance system partly through the amendments of the constitution approved by Parliament and partly through orders and proclamation of the military rulers. These changes had included the shifting of parliamentary to the presidential system of government and vice versa, with consequential changes in power and the role of the Parliament. There is no denying that the history of the Parliament of Bangladesh is shaped by both constitutional and extra-constitutional regimes, which hampered the institutionalization of democracy, healthy growth of the parliamentary institutions, and the role of the Parliament in the legislative process. Not all parliaments elected between 1972 and 2018 provided a means for the succession of government. The 5th, 7th, 8th, 9th, and 10th Parliament of Bangladesh provided a way for the succession of government. This lack of democratic continuity due to military and authoritarian rule sometimes under the veil of a democracy undermined the institutionalisation of the parliamentary system. Institutionalisation is also hamstrung by (a) alleged vote riggings in the elections under political party governments, and (b) diluting the separation of power between legislature and

¹ Sebastian M Saiegh, ‘The Role of Legislatures in the Policymaking Process’, A study prepared for delivery at the Workshop on State Reform, Public Policies and Policy-making Processes, Inter-American Development Bank, Washington DC (28 February- 2 March 2005) 9 <https://www.researchgate.net/publication/228471685_The_Role_of_Legislatures_in_the_Policymaking_Process> accessed 27 December 2021.

executive through the appointment of ministers from the parliamentary opposition in a parliamentary form of government. A reasonable degree of stability and representative parliament is essential for such institutionalisation.

There is no doubt that like many other developing countries' parliament, the Parliament of Bangladesh is also on its decline not only in terms of the transfer of power from the legislature to the executive regarding lawmaking but to the loss of dignity and moral influence of the legislature.² Frequent changes in the political system of Bangladesh during the last fifty years disrupted the effective functioning of parliament and critically hampered its development as a system of accountability-both vertically and horizontally.

7.2 Dimensions of Parliamentary Accountability

Accountability of the executive branch figures prominently in the discourse of the parliamentary system of government in any country. Public trust, legitimacy, and confidence in the parliamentary system rest on the accountability mechanism in parliament.³ The concept of accountability has two main aspects- answerability and enforcement. Answerability refers to the obligation to provide information about decisions and actions and justify them to stakeholders and other overseeing entities.⁴ Enforcement requires sanctions and redress when the actor fails to meet its obligations.⁵ Accountability concerns the allocation and acceptance of responsibility for decisions and actions; the extent to which a governing body is answerable to its constituency; the extent to which a governing body is answerable to 'higher level' authorities; and the allocation of responsibilities to those institutional levels that best match the scale of issues and values being addressed.⁶ Accountability has many dimensions, including vertical and horizontal. A vertical mechanism is a process by which society holds public and elected officials to account while horizontal accountability refers to mechanisms of checks and balances within state structures.⁷ Vertical accountability is implemented through civil society campaigns, the wide use of the media and the mobilisation of public protest against wrongdoings by the government agencies.

²The concept of 'decline' was first propounded by Bryce, see J Bryce, 'The Decline of Legislatures' in P Norton (ed), *Legislatures* (OUP 1990) 47–56.

³EL Normanton, 'Public Accountability and Audit: A Reconnaissance' in Hague B Smith and DC Hague (eds), *The Dilemma of Accountability in Modern Government: Independence Versus Control* (Palgrave Macmillan 1971) 311–345, 311.

⁴Andreas Schedler, 'Conceptualizing accountability' in A Schedler et al. (eds), *The Self-Restraining State: Power and Accountability in New Democracies*, (Lynne Rienner Publishers 1999) 13–29.

⁵ibid.

⁶R Staphenurst and M O'Brien, 'Accountability in Governance' (Unpublished Paper, World Bank) <<https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>> accessed 23 November 2021.

⁷ibid.

The horizontal accountability of parliament is exercised through its legislation and budget making; and, in scrutiny and oversight of the executive branch of the government. On the other hand, the vertical accountability of parliament is exercised when citizens, media and civil society attempt to hold the elected representatives accountable. Under the vertical accountability, citizens can seek the support of the parliamentarians to redress grievances, and through parliamentary hearings, questions, and other means, hold the government accountable.⁸

7.2.1 Ministerial Responsibility Through Parliament

Under the parliamentary system of Bangladesh, ministers are individually and collectively responsible to Parliament for their respective ministries. According to the notion of collective responsibility, the Prime Minister and the cabinet is responsible to Parliament and remains in power if it retains the confidence of the majority in Parliament. When the cabinet loses the confidence of parliament, it must resign. On the other hand, the doctrine of individual ministerial responsibility requires ministers to be individually responsible to parliament for his/her actions. It also requires that individual ministers resign if they want to differ in public with government policies. In other words, once a decision is made, every minister must defend it in public.⁹ But the Constitution of Bangladesh does not contain express provision on individual ministerial responsibility. The principle is considered essential as it is seen to guarantee that an elected official is answerable for every single government decision.¹⁰ According to article 55(3) of the Bangladesh Constitution, the ministers are collectively responsible to Parliament. Again, according to article 57(2) of the Constitution, the government would collectively fail only when the prime minister loses confidence of the majority of the members of Parliament. But experience shows that such collective responsibility is never exercised in Bangladesh because of the prohibition of floor crossing under article 70 of the Constitution of Bangladesh.

7.2.2 Oversight Through Deliberation in Parliament

Asking questions, motions, and making discussions during budget approval are considered important mechanisms of accountability through which members of Parliament discuss administrative actions and ask for an account from the ministers

⁸ *ibid.* 3.

⁹ Nizam Ahmed and ATM Obaidullah, 'Introduction', in Nizam Ahmed and ATM Obaidullah (eds), *The Working of Parliamentary Committees in Westminster Systems: Lessons for Bangladesh* (University Press Limited, Dhaka, 2007) 2.

¹⁰ *ibid.* 3.

concerned for administrative wrongdoings or abuse of power.¹¹ In the parliamentary form of governments, parliamentary questions, supplementary questions and motions enable the members of the parliament to scrutiny over the acts of government and bureaucracy and to ventilate public grievances.¹² The MPs can ask questions to the Prime Minister, other ministers and the parliament secretariat. The Prime Minister's Question Time (PMQT) was introduced in the seventh parliament in 1997.¹³ However, in Bangladesh, such questions are far less effective and usually very few questions are answered, and motions discussed in the House.¹⁴ It has been observed that during the question session parliament members discuss irrelevant issues other than their questions and waste the valuable time of the session.¹⁵

Opposition parties in parliament are supposed to play a critical role in ensuring accountability of the ruling party and executive organ. In the parliamentary system of government, opposition parties work as a shadow government through their critiques and watchdog of government activities.¹⁶ But in the parliamentary culture of Bangladesh, opposition parties hardly play this crucial role as they sometimes get marginalised due to the enormous majority of the ruling party most of the times, which encourage the ruling party to go as far as outright ignoring the opposition.¹⁷ Moreover, during the elections political parties form alliances which also stop them from raising voice against ministers when their alliances come to power.¹⁸ Moreover, both ruling and opposition parties engage in the blame game, which limits their active role in parliament.¹⁹ Another problem of Parliament is quorum crisis, which indicates parliamentarians are not that interested in participating in parliament activities.²⁰ There is also a trend of continuing boycotting parliament sessions by the opposition. Such practice of boycotting, the absence of effective opposition in Parliament, a culture of mistrust between major political parties acts as a major hindrance to the effective functioning of Parliament.²¹ In fact, the practice of boycott of parliament is unique to Bangladesh.²²

¹¹ Mohammad Mikail and Mohammad Shahjahan Chowdhury, 'Examining Parliamentary Accountability System in Bangladesh: Theory and Practice' (2017) 24(1) *Bangladesh Journal of Public Administration* 77

¹² Noore Alam Siddiquee, 'Bureaucratic Accountability in Bangladesh: Challenges and Limitations' (1999) 7(2) *Asian Journal of Political Science* 88–104, 91.

¹³ Rule 41 of the Rules of Procedure of Parliament of the Peoples' Republic of Bangladesh (as modified up to 11 January 2007) <<http://www.parliament.am/library/kanonakarger/bangladesh.pdf>> accessed 25 May 2022.

¹⁴ Siddiquee (n12).

¹⁵ Mikail and Chowdhury (n 11).

¹⁶ *ibid* 79.

¹⁷ *ibid*.

¹⁸ *ibid*.

¹⁹ *ibid*. 79.

²⁰ *ibid*.

²¹ *ibid*. 79.

²² Rounaq Jahan and Inge Amundsen, 'The Parliament of Bangladesh: Representation and Accountability' CPDCMI Working Paper (2012) 2.

7.2.3 *Parliamentary Committees*

Effective parliamentary committees can play a crucial role in ensuring accountability of the government; transparent management of public expenditure and enhancing general oversight of executive activities. Parliamentary committees are formed due to the capacity and time constraints of MPs to scrutinise all policies and legislation on the floor of the House. Committees consisting of smaller groups of members to examine the subjects would ensure deeper deliberation and debate. It has been argued that an effective committee system is a mechanism by which a parliament can retain its central supervisory position in the increasingly intricate web of accountability system.²³ Parliamentary committees are distinct from other individual techniques of accountability in way that committees have better scope to examine a particular issue in-depth and explore possible remedies.²⁴ They are seen as an increasingly important vehicle of ministerial accountability as they can give a rather broad and full account of ministerial performance through inquiry of a particular area and the role of the minister.²⁵ It has been claimed that properly functioning committees develop internal modes of working that overcome the partisan divisions of other areas of parliamentary life through working in a small focused group.²⁶ Where committees specialise by subject area, they have the capacity to acquire expertise and experience over time and are consequently better placed to scrutinise the executive action and hold it to account.²⁷

The Parliamentary committee system of Bangladesh derives its power from the Constitution and Rules of Procedure. Article 76 of the Constitution provides that Parliament shall appoint from among its members the following standing committees, (a) a public accounts committee, (b) committee of privileges, and (c) such other standing committees as the Rules of Procedure of Parliament require. In addition to these committees, Parliament shall appoint other standing committees (a) to examine draft Bills and other legislative proposals, (b) to review the enforcement of laws and propose measures, and (c) to investigate or inquire into the activities or administration of a Ministry and may ask for relevant information from such Ministry. These committees have also powers for enforcing the attendance of witnesses and compelling the production of documents.

In the Parliament of Bangladesh, there are three types of committees: standing committees, special committees, and select committees. While standing committees are permanent, special and select committees are temporary. There are standing

²³ Ahmed and Obaidullah (n 9) 2.

²⁴ *ibid.*

²⁵ Phil Larkin, 'Ministerial Accountability to Parliament' in Keith Dowding and Chris Lewis (eds), *Ministerial Careers and Accountability in the Australian Commonwealth Government* (Australian National University Press 2012) 102–103.

²⁶ *ibid.*

²⁷ *ibid.* 102–103.

committees on Public Accounts, Government Assurances, Private Member Bills and Resolutions, Estimates, Rules and Procedures, Public Undertakings, and Petitions. However, the largest group of Committees is related to ministries and their departments.²⁸ These committees examine legislative proposals, review the performance of the ministries, scrutinize activities of public organisations and look into any irregularities in their operation.²⁹ These committees have the power to summon any individual or organization for testimonies and submit a report for consideration by Parliament. They can ask administrative officials to appear before parliamentary committees to explain the administrative activities of ministries where they work.

Amongst the committees, finance, and audit committees, namely the Committee on Public Accounts, and Committee on Estimates and Committee on Public Undertakings are considered as special mechanisms of Parliament to perform its supervisory role over the government expenditures. In particular, the Public Accounts Committee can examine whether the affairs of public undertakings are being managed by sound business principles and prudent commercial practice and report to parliament on the irregularities and lapses of the public undertakings and recommend measures to free the institutions of corruption.³⁰

The membership of committees is generally distributed among different parties in proportion to their strength in Parliament and the ruling party MPs have been traditionally allocated the chairmanship of different committees.³¹ Therefore, although the parliamentary committee system is supposed to operate based on neutrality, many members often fail to overcome partisan sentiment. The reports of parliamentary committees are to be tabled before Parliament for debate and implementation of recommendations in the reports becomes obligatory on the ministries and others concerned if these are adopted by the House.³²

However, there are many problems that the Parliamentary committees are facing. For example, the activities of the standing committees are usually confined to review of some routine findings of ministries and their agencies rather than an in-depth investigation into budgetary and implementation performance.³³ Although committees in Parliament have the power to take evidence, they rarely employ this power.³⁴ There is also lack of transparency in committee activities since as per the

²⁸ Ahmed Shafiqul Huque, 'Accountability and governance: strengthening extra-bureaucratic mechanisms in Bangladesh' (2011) 60(1) *International Journal of Productivity and Performance Management* 59–74, 68.

²⁹ *ibid.*

³⁰ Rule 238(C) (n 13)

³¹ M Jashim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh* (Book Zone Publication 2021) 423.

³² *ibid.* 425.

³³ *ibid.*

³⁴ *ibid.*

Rules, committee sittings must be held in private.³⁵ As a result, people do not know what is going on in the committees. Also, reports of the committees are not easily accessible to the public. Rules 199 and 201 of the Parliamentary Rules of Procedure make require the withdrawal of all persons other than members of the Committee and officers of the Parliament Secretariat whenever the Committee is deliberating. Rule 203 allows the government to decline to produce a document required by any committee on the ground of safety and interest of the State. The seventh Parliament adopted an amendment of Rule 247 on 10 June 1997 by which though a Minister cannot be the chairman of the Standing committees, he/she still can be an *ex officio* member of the Standing committee.³⁶ This amendment conflicts with Rule 188(2) which provides that a minister will not take part in committee deliberation unless invited by the Committee.

Sometimes committee members remain dormant in debates and discussions owing to a lack of interest, awareness, and experience about the committee activities. The party in power and the government do not show much interest in the activities as well as the findings of the committees.³⁷ Irregular meetings and poor attendance of members, non-compliance by ministers with the recommendations and directives made in the committee reports, overlapping responsibilities of the committees - all these factors combined to render the parliamentary committee system ineffective.³⁸ On the other hand, failure on the part of many agencies to supply relevant information, non-binding nature of the recommendations of the committees, and lack of resources to carry out their functions including conducting inquiries also contribute to the inefficiency of the committee system.³⁹

The inclusion of members in the committees having a conflict of interest of some committee in the areas of their work is also prevalent practice in Bangladesh. According to Rule 188(2), MPs are prohibited from being appointed to a parliamentary standing committee wherethey may have a 'personal, pecuniary or direct interest in any matter which may be considered by that committee'. But it is quite appalling that there is no mechanism to screen out a member with conflict of interest on a particular issue or policy.⁴⁰ Furthermore, since most of the committees' members come from the ruling party, they are not interested to investigate their own faults.⁴¹

³⁵ Rule 199 (n 13).

³⁶ Rule 247 (n 13).

³⁷ Siddiquee (n12) 92.

³⁸ Al Masud Hasanuzzaman, 'Role of Parliamentary Committees in Bangladesh' in Nizam Ahmed and ATM Obaidullah (eds), *The Working of Parliamentary Committees in Westminster Systems: Lessons for Bangladesh* (University Press Limited, Dhaka 2007) 55–56.

³⁹ Jahan and Amundsen (n 22) 26.

⁴⁰ 'The Parliament of Bangladesh: Representation and Accountability', CPD-CMI Working Paper 2 (2012), Center for Policy Dialogue, Dhaka <http://www.cpd.org.bd/pub_attach/CPD_CMI_WP2.pdf> accessed 12 December 2021.

⁴¹ Mikail and Chowdhury (n11) 81.

7.2.4 *Prohibition of Floor-Crossing*

The term ‘defection’ means floor crossing by a member of one political party to another party. It is well-established that defection can cause governmental instability. Article 70 of the Constitution of Bangladesh as amended by the 15th amendment provides that an elected MP nominated as a candidate by a political party shall vacate his seat if he (a) resigns from that party; or (b) votes in Parliament against that party but shall not thereby be disqualified for subsequent general election as a member of Parliament. This is the original provision of the 1972 constitution which was drastically changed by the fourth and twelfth amendment in 1975 and 1991 respectively, which had seriously undermined the parliamentary democracy in Bangladesh. The original provision of floor-crossing under the 1972 constitution had been restored by the fifteenth amendment in 2011.

This prohibition of floor-crossing seriously undermines the freedom of the members of parliament in discharging their duties in Parliament. The MPs who fail to comply with party directives risk losing the membership of Parliament.⁴² While this current provision of article 70 since the 15th amendment of the constitution envisages stability and continuity of the government, it allows the members of Parliament from the ruling party to criticise the government actions and policies, programs which were not possible earlier. Even they can abstain from voting being present in Parliament or remain absent in Parliament if they do not like or support any policy of the government. This is a welcome development in terms of the accountability of the government.

7.2.5 *Vertical Accountability Through Participatory Legislation*

As mentioned above, vertical accountability of parliament is exercised when it is directly elected by the citizenry and directly accountable to the citizens through the ballot box. Apart from this direct election, vertical accountability of parliament is also exercised through enhanced public engagement through providing more information to the public, improving its visibility and accessibility to the public, and embracing more direct involvement of the citizens in the law-making process. Visibility depends on the extent to which parliamentary proceedings and the activities of MPs can be viewed by the public while accessibility refers to the role of the citizens as a constituent and their access to parliament and the degree to which parliament is open and responsive to legislative initiatives.⁴³ In particular, public participation in the law-making process is considered as an important

⁴² *ibid.*

⁴³ Hyeon Su Seo and Tapio Raunio, ‘Reaching out to the people? Assessing the relationship between parliament and citizens in Finland’ (2017) 23(4) *The Journal of Legislative Studies* 614–634, 617.

dimension of this vertical accountability. A good law is not merely an outcome of an enlightened and democratic society but also is the inevitable result of the legislative process itself. In democratic societies, laws are regarded as the embodiment of the will of the people. There is a popular perception that laws enacted by an elected parliament can ensure the people's expectations and their legitimate demands. However, the generalised idea is not quite right, as there are many instances of undemocratic laws passed by popularly elected parliament.

Jeremy Bentham, a philosopher, and the main proponent of utilitarianism, considered legislation as the principal instrument of legal reform and underlined the necessity for the reflection of public opinion into the legislative process. According to him, 'the goodness of the laws depends upon their conformity to general expectation'.⁴⁴ This popular expectation is an integral part of legislative activities in any democratic society. To quote Jeremy Bentham:

How has been public opinion consulted? What is its organ? Have the whole people but one uniform notion on the subject? Have all the community the same sentiments, including perhaps nine out of ten, who never heard of the subject spoken of?⁴⁵

In such a state of the affair, not only are people unaware of the rights and benefits conferred by law, but the legal system gets marginalised through non-reflection of popular opinion and civil society views in the law-making process. The participation of the people in the law-making process is increasingly perceived as an essential prerequisite of the process of democratisation of the society. People's participation in the law-making process is essential for various reasons: it reflects popular expectation and fulfills people's aspiration, enhances the acceptability of the law, and facilitates awareness of law as well as rights. People's participation in the law-making process enriches their knowledge of laws and helps them develop clear ideas about their rights, duties, and privileges. It strengthens and empowers civil society. Dicey remarked on this issue in the nineteenth century that 'the best form of government for any civilized country...is a constitution under which the wish of the majority of the citizens ultimately determines the course of legislation'.⁴⁶ Dicey also remarked that legislation must be determined by public opinion, and where the public has influence, the development of the law must of necessity be governed by public opinion.⁴⁷ The lack of deliberation, consultation and proper scrutiny in the legislative process may lead to lack of clarity in the objectives, law can become complex and beyond the understanding of the ordinary people, the law may not respond to the changing needs of societies, and paves the way for discontent and disobedience.

When actual law-making begins at the Parliament in Bangladesh, generally little deliberation takes place and laws are passed hurriedly giving no scope of taking public

⁴⁴Jeremy Bentham, *Theory of Legislation*, edited by Upendra Baxi (Bombay, third Reprint 1995) 90.

⁴⁵ibid.

⁴⁶AV Dicey, *Law and Public Opinion in England*, (Second Indian Reprint, Universal Law Publishing 1998) lxxi-xii.

⁴⁷ibid.

opinion into consideration. The ruling party virtually monopolies the business of Parliament as long as they command the majority support. Although sometimes, the bill is sent to the legislative committee for ostensible scrutiny, ultimately it is enacted through mechanical voice votes of the members of Parliament without sustained and meaningful discussion and deliberation. As a result, most laws are not brought into public domain and discourse during the process of their enactment. But there is a clear provision in the rules of procedure of Parliament that the Select Committee shall circulate a draft bill for eliciting public opinion. However, the legislators hardly take this provision into consideration. Against this common trend, there are some recent attempts for public consultation and public participation in the law-making process of the Parliament of Bangladesh. Over the last few years, 2017–2021, several laws have been formulated with inputs from relevant stakeholders.⁴⁸ This is an encouraging development towards an inclusive legislative process.

7.2.6 *Legislation by Ordinance*

The executive's power of law-making is recognised in some special circumstances by constitutional norms of many countries. The power to make an Ordinance is justified on the ground that the executive must be armed with powers to meet unforeseen and extreme necessity when the parliament is not in session or is dissolved. Under article 93 of the Constitution of Bangladesh, the President may make an Ordinance in the following two situations (i) Parliament is not in session, or (ii) Parliament stands dissolved. In these two situations, the President can promulgate Ordinance only when he/she is satisfied that circumstances exist which requires immediate action. It is also a constitutional requirement that the Ordinance shall be laid before Parliament at its first meeting following the promulgation of the Ordinance and it will cease to have effect at the expiration of thirty days if it is not approved by Parliament.

A significant portion of the laws of Bangladesh originates in the form of Ordinances promulgated by the President when Parliament is not in session, or it stands dissolved. These Ordinances are turned into law by the simple fact of majority ruling party giving no scope for adequate deliberation amongst the people at large in Parliament. Partisan and narrow outlook prevails upon the consideration of adopting most of Ordinances. It is often said that the Ordinance-making power of President is based on his subjective satisfaction and in this sense, it is an exercise of executive power.⁴⁹ It may be mentioned that parliamentary committees have been

⁴⁸For example, *Bangladesh National Archives Act 2021 (Act No. 21 of 2021)*, *Special Security Forces Act 2021 (Act No. 24)*, *Marine Fisheries Act 2020 (Act no. 19)*, *Bangladesh Flag Vessels (Protection) Act 2019 (Act no. 18)*, *Road Transport Act 2018 (Act no. 47)*, *Hindu Religious Welfare Trust Act 2018 (Act no. 42)*, and *Bangladesh Academy for Rural Development Act 2017 (Act no. 4)*.

⁴⁹Chowdhury (n 31) 412.

assigned the functions in the legislative process only in case of ‘Government Bill’ or ‘Private Member Bill’ but not in making of Ordinances.

7.3 Scenario of Legislative Practice in Bangladesh

The Parliament of Bangladesh is still characterised as a body of approving executive orders rather than a forum of public space for policy deliberation. Although the legislative authority is vested in Parliament, it plays merely as a subordinate role in legislative procedures. Sometimes the ways in which laws are rushed through Parliament do not comply with the rules of procedure. Apart from this, out of the total legislation, a considerable portion of legislation are in the form of amending ordinances, that is adding/subtracting and changing previously enacted laws which itself is a good indicator of the weakness of the legislative process. This dismal picture of the legislative scenario is not conducive to the democratic norm.

In our constitutional practice, there has been a tendency to bypass Parliament and resort to order or Ordinance-making powers by the President from the very inception of functioning of Parliament. For example, in the first Parliament which started after the commencement of the Constitution, 44 President’s orders, 7 in 1972 and 37 in 1973 were proclaimed.⁵⁰ The Second Parliament (2 April 1979 to 2 March 1982) was dominated by the proclamations under martial law and the Constitution was made subservient to martial law by proclamation. The parliamentary election of 1979 was held while the country was still under martial law. In the meantime, the martial law regime promulgated 268 Ordinances and Proclamations. As a matter of fact, Parliament itself was revived by a presidential proclamation. The Second Parliament passed 65 laws out of which 27 were Ordinances in the form of bills and subsequently passed by the House. Out of all Acts passed by the Second Parliament, the Constitution (Fifth Amendment) Bill 1979 was the most controversial one. It was passed during the first session of the Second Parliament, which gave auto-legality to 159 proclamations, martial law orders and ordinances and other laws including the draconian Indemnity Ordinance made during the period between 15 August 1975 and 9 April 1976. These Ordinances were not formally introduced as Bills in Parliament and as a result, they were not transformed into Acts of Parliament. However, these Ordinances have been repealed now.

It revealed that Parliament’s main task under the military regime was to approve executive orders and most of the activities of Parliament were related to the legitimisation of usurpation of the governmental authority by unconstitutional means. Many of the laws are still enforceable as Ordinances as they not produced before the first sessions of Parliament as the constitutional requirement or they are

⁵⁰ Justice Muhammed Habibur Rahman, ‘Our Experience with Constitutionalism’ (1998) 2(2) *Bangladesh Journal of Law* 126.

not repealed or otherwise amended by Parliament or by any other subsequent amendment.

A comparative scenario of legislative practice of different parliamentary periods has been shown in the Table for a clear grasp and in-depth understanding of the issue:

Chronology of parliaments	Number of acts	Number of ordinances	Total laws
First parliament	64	94	154*
Second parliament	38	27	65
Third parliament	16	307	323
Fourth parliament	145	92	237
Fifth parliament	103	70	173
Sixth parliament	1	0	1
Seventh parliament	185	5	190
Eighth parliament	185	08	193
Ninth parliament	271	144	415
Tenth parliament	193	06	199

As mentioned earlier, although the Constitution perceives Ordinance-making as only an extraordinary measure, the above data indicate that it has been abused for political purposes and used as a tool of sustaining power when it is necessary. This executive's legislative power has been subjected to the following criticism:

First, the subjective satisfaction of the President has allowed the executive to exercise the power of ordinance-making, in most cases, in an undemocratic and irresponsible way so that Parliament may be bypassed. This trend of law-making hampers seriously the growth of constitutionalism and democratic governance. In *Kudrat E. Elahi Panir & Others vs. Government of Bangladesh*,⁵¹ the Supreme Court held that the President's satisfaction as to whether circumstances exist for taking immediate action under the article 93 is not totally excluded from judicial inquiry, but to date no Ordinance has been struck down on the grounds of its either being ultra vires or malafides. The statistics given above show that from the first to fifth Parliament, the number of Ordinances placed for approval before Parliament has always been larger than the general Bills introduced. The statistics also show that between the periods from the First to Fifth Parliament (1973–1995), nearly half of the laws originated from Ordinances.⁵² However, this trend is now declining from the seventh Parliament (1996).

Second, legislation by ordinance is not fully compatible with the concepts of rule of law and supremacy of Parliament. Rule of law presupposes that the law should be made through a democratically elected parliament after adequate deliberation and discussion. When a bill is formally introduced in Parliament, it needs to go through a number of stages – first reading, second reading, committee stage, and last but not least third reading. At every stage, there is scope for discussion in both Parliament and public media. This scope of adequate deliberation on a bill creates an

⁵¹ 44(1992) DLR (AD) 319.

⁵² Md Abdul Halim, *Constitution, Constitutional Law and Politics: Bangladesh Perspective* (CCB Foundation, Dhaka 2008).

environment to remove undemocratic provisions from it. But there is no such scope in the case of Ordinances as they are framed in the privacy of ministries and passed by the cabinet without any public exposure.

The participation of the society in the legislative process in Bangladesh has remained at a minimum level partly due to the military regime during which laws were made in an extra-constitutional way as coercive apparatus of the state does not allow any dissent and partly due to the hegemonic attitude of the elected governments. During the military regime, most of the laws were made in the form of martial law proclamation and order while a great portion of the laws are enacted in the form of Ordinances by the elected governments. The exclusionary nature of the law-making process started by the military regimes continued, to some extent, even by subsequent democratically elected governments.

It is increasingly realised that besides Parliament, there should be other ways and means which can ensure that people's legitimate interests are given due consideration in the law-making process. It entails, in broader sense, scrutinising the purposed bills to gauge the policy and principles involved, and assessing the acceptability and technical soundness of the proposed laws. Therefore, public consultation is treated as desirable safeguard for the democratisation of the law-making process, which enables the interests affected to make their views known to the legislature, and thus help framing the law.⁵³

In the UK it is the well-established practice that publicity and sufficient public participation and consultation should take place before a law to be enacted.⁵⁴ In the US the provision of public consultation or 'Public Hearing' is mandatory for every kind of proposed legislation after its introduction in the Congress.⁵⁵ This consultation process is conducted by the Committee and Sub-Committee through 'Public Hearing' to scrutiny the proposed legislation. In this process, experts, lobby groups, interested bodies and institutions as well as the ordinary citizens can come forward to express their views and inputs into the law-making process. Experts concerned with the legislation are called in to give testimony and the interest group from which the idea for the bill originated also sends experts to testify.⁵⁶

7.4 Agendas for Reform for Strengthening Parliament

The following recommendations have been suggested for strengthening the Parliament of Bangladesh:

⁵³ MP Jain, *Treaties on Administrative Law* (Wadhwa and Company 1996) 163–64.

⁵⁴ John P Mackintosh, *The Government & Politics of Britain* (Hutchinson University Library 1970).

⁵⁵ Phil Harris, *An Introduction to Law* (Butterworths 1995) 144.

⁵⁶ Jack E Holmes et al., *American Government: Essentials and Perspective* (McGraw-Hill College 1991) 195; M Rashiduzzaman, *Politics and Government in the New World* (Kendal/Hunt Publishing Company 1993) 158.

- Rule 246 should be amended for empowering the Standing Committees to entertain individual complaints against the ministry and to call upon organised groups likely to be affected by a proposed legislation.
- Although extracting information from ministers is an essential element of their accountability to Parliament, extracting an explanation from them and an opportunity to follow up their answers is also needed.
- The parliamentary committee meetings are not open to the public. While this is a common feature of parliaments of other countries, Committees can increase the number of public hearings and should expand the scope of hearings by involving more diverse social sectors and enhancing engagement with the public. It is widely believed that intensive scrutiny of the performance of the government is possible only at the parliamentary committee level and in order to enhance their effectiveness, people should have access to the committee proceedings.
- Access of the people to legislative information is essential for meaningful involvement of diverse segments of the society in law-making process, who are both directly or indirectly affected by legislation is vital for the democratic process. Therefore, legislative information should be accessible to the people.
- Setting a fixed time frame for ministerial response to questions can facilitate a higher level of accountability of the government.
- Stakeholder consultation should be a regular feature of the law-making process rather than on an ad hoc basis. Public opinion must be considered as an important support structure both for the legitimacy of law and its effective implementation.
- The parliamentary committees need to be further strengthened through equipping them with necessary logistic support and financial resources.
- All reports of the parliamentary standing committees submitted before Parliament and approved by it should be properly implemented.

7.5 Conclusion

In the last fifty years, the Parliament of Bangladesh as an instrument of representative government and deliberative institution could not deliver the expected outcome as its legislative process have largely remained under the overwhelming domination of the executive branch. This has also led the role of Parliament in holding the governments in decline. However, there are some positive developments regarding the Parliament of Bangladesh. In Bangladesh, legislative sessions are now accessible to the public, public information about legislative actions is readily available, and some recent laws have been formulated after taking into account of input of stakeholder consultation. Now, all open sessions including question-answer sessions of Parliament are broadcast live, which enhances transparency in the parliamentary activities.

Despite some positive developments, it can be fairly argued that after fifty years of the adoption of the Constitution, the executive accountability through Parliament has become largely rhetorical because of its rubber stamping of executive decisions very often obviating the constitutional requirements. Dismal performance

of the parliamentary committees, the lack of serious engagement of opposition MPs in the parliamentary activities, constitutional ban on floor-crossing, and very limited role of public participation in the law-making process also militate against Parliament in holding the executive accountable. Against this milieu, the reform agenda proposed above is likely to go a long way in strengthening the role of Parliament to ensure the democratic accountability of governments in Bangladesh.

References

Books

- Bentham, Jeremy. 1995. *Theory of Legislation*, edited by Upendra Baxi (Bombay, 3rd Reprint).
- Chowdhury, M. Jashim Ali. 2021. *An Introduction to the Constitutional Law of Bangladesh*. Dhaka: Book Zone Publication.
- Dicey, A.V. 1998. *Law and Public Opinion in England*. (Second Indian Reprint). Universal Law Publishing.
- Halim, Md Abdul. 2008. *Constitution, Constitutional Law and Politics: Bangladesh Perspective*. Dhaka: CCB Foundation.
- Harris, Phil. 1995. *An Introduction to Law*. Butterworths.
- Holmes, Jack E., et al. 1991. *American Government: Essentials and Perspective*. Los Angeles: McGraw-Hill College.
- Jain, M.P. 1996. *Treaties on Administrative Law*. Agra: Wadhwa and Company.
- Mackintosh, John P. 1970. *The Government & Politics of Britain*. London: Hutchinson Uni Library.
- Rashiduzzaman, M. 1993. *Politics and Government in the New World*. Dubuque: Kendal/Hunt Publishing Company.

Chapters in Edited Books

- Ahmed, Nizam, and A.T.M. Obaidullah. 2007. Introduction. In *The Working of Parliamentary Committees in Westminster Systems: Lessons for Bangladesh*, ed. Nizam Ahmed and A.T.M. Obaidullah, vol. 2. Dhaka: University Press Limited.
- Bryce, J. 1990. The Decline of Legislatures. In *Legislatures*, ed. P. Norton, 47–56. Oxford: OUP.
- Hasanuzzaman, Al Masud. 2007. Role of Parliamentary Committees in Bangladesh. In *The Working of Parliamentary Committees in Westminster Systems: Lessons for Bangladesh*, ed. Nizam Ahmed and A.T.M. Obaidullah, 55. Dhaka: University Press Limited.
- Larkin, Phil. 2012. Ministerial Accountability to Parliament. In *Ministerial Careers and Accountability in the Australian Commonwealth Government*, ed. Keith Dowding and Chris Lewis, 102. Australian National University Press.
- Normanton, E.L. 1971. Public Accountability and Audit: A Reconnaissance. In *The Dilemma of Accountability in Modern Government: Independence Versus Control*, ed. Hague B. Smith and D.C. Hague, 311–345. London: Palgrave Macmillan.
- Schedler, Andreas. 1999. Conceptualizing Accountability. In *The Self-Restraining State: Power and Accountability in New Democracies*, ed. A. Schedler et al., 13–29. Boulder: Lynne Rienner Publishers.

Articles

- Huque, Ahmed Shafiqul. 2011. Accountability and governance: strengthening extra-bureaucratic mechanisms in Bangladesh. *International Journal of Productivity and Performance Management* 60 (1): 59–74.
- Jahan, Rounaq and Inge Amundsen. 2012. The Parliament of Bangladesh: Representation and Accountability. *CPDCMI Working Paper*.
- Mikail, Mohammad, and Mohammad Shahjahan Chowdhury. 2017. Examining Parliamentary Accountability System in Bangladesh: Theory and Practice. *Bangladesh Journal of Public Administration* 24 (1): 77.
- Rahman, Justice Muhammed Habibur. 1998. Our Experience with Constitutionalism. *Bangladesh Journal of Law* 2 (2): 126.
- Seo, Hyeon Su, and Tapio Raunio. 2017. Reaching Out to the People? Assessing the Relationship Between Parliament and Citizens in Finland. *The Journal of Legislative Studies* 23 (4): 614–634.
- Siddiquee, Noore Alam. 1999. Bureaucratic Accountability in Bangladesh: Challenges and Limitations. *Asian Journal of Political Science* 7 (2): 88–104.

Internet Sources

- Saiegh, Sebastian M. 2005. *The Role of Legislatures in the Policymaking Process*. A study prepared for delivery at the Workshop on State Reform, Public Policies and Policy-making Processes, Inter-American Development Bank, Washington DC (28 February – 2 March 2005). https://www.researchgate.net/publication/228471685_The_Role_of_Legislatures_in_the_Policymaking_Process. Accessed 27 Dec 2021.
- Stapenhurst, R and M O'Brien. *Accountability in Governance* (Unpublished Paper, World Bank). <https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>. Accessed 23 Nov 2021.
- The Parliament of Bangladesh: Representation and Accountability. 2012. *CPD-CMI Working Paper 2*, Center for Policy Dialogue, Dhaka. http://www.cpd.org.bd/pub_attach/CPD_CMI_WP2.pdf. Accessed 12 Dec 2021.

Abdullah Al Faruque is Professor of Law at Chittagong University, Bangladesh. He was a Visiting Fellow at Macquarie University Law School, Australia. He was Dean and Head of the Department of Law, Chittagong University. He holds LLB (Hons), LLM from Dhaka University and PhD from Dundee University, UK where he also served as a post-doctoral fellow (2009–2010) under Commonwealth Academic Staff Fellowship. His recent books are: *Nuclear Energy, Risks and the Environment* (Routledge), *Petroleum Contracts: Stability and Risk Management in Developing Countries*, *International Human Rights Law: Protection Mechanisms and Contemporary Issues*, *Environmental Law: Global and Bangladesh Context*, *Essentials of Legal Research* and *Natural Justice: From Principles to Practice*, *Cases and Materials on Clinical Legal Education* (edited), and *New Dimensions of Law and Legal Ethics in Theory and Practice: A Bangladesh Context* (Mullick Brothers, Dhaka). He has published chapters in edited books published by Cambridge University Press, Routledge, Springer, and Brill, and authored numerous articles. He received UGC Gold Medal twice for his outstanding research in environmental law, served as an Executive Editor of Chittagong University Journal of Law (2012–2016), Country Reporter, Oxford Project on Reporting of International Law in Domestic Courts, and consultant of UNDP, ILO, USAID, German Watch, and other NGOs.

Chapter 8

Constitutionalisation of Good Governance and Human Rights: Where Does Bangladesh Stand at Fifty Years?



Sumaiya Khair

Abstract Good governance and human rights principles are recognised by national constitutions and constitute the core of the constitutional order of modern States, determining not only interactions between citizens and the State, but also informing State structures, decision-making, and oversight processes by holding public officials accountable for acts or omissions that are contrary to the constitution. As such, the constitution functions as the foundation of a country's governance system, in addition to being a bill of rights. This chapter looks at how the Constitution of Bangladesh balances fundamental rights and fundamental principles of state policy to ensure good governance, preserve the rule of law, and pave the way for a just, free, and democratic social order. To this end, it examines the institutional, legal and policy framework, practices, and challenges that have over the years shaped the culture of governance and human rights in Bangladesh.

Keywords Constitution · Good governance · Human rights · Safeguards · Non-state actors · Politicisation · Public administration · Civil society · Accountability

8.1 Introduction

Most national constitutions function as the supreme law of the land, which cannot be overridden by any ordinary legislative act. While the content and nature of the constitution may vary from country to country, the common elements that hold a constitution together include the basic principles on which the concerned state is founded, the structures and processes which guide the work of the government and fundamental rights of citizens which provide safeguards against prejudice and harm. It is now widely recognised that governance and human rights are closely interlinked and mutually reinforcing. As such, the UN and its different agencies and international

S. Khair (✉)

Department of Law, University of Dhaka, Dhaka, Bangladesh

e-mail: skhair@gmail.com

development partners have been urging States to aspire to reach the highest standards of good governance and human rights in respective national context.

Good governance and human rights, in their interpretation and application, are further strengthened by salient provisions of national constitutions, which function as a cornerstone of a country's governance system, in addition to being a bill of rights. Epitomising the key principles of good governance and human rights in various provisions, the Constitution of Bangladesh, which celebrates 50 years in December 2022, is no different. That a democratic society is characterised by the rule of law, democratic governance, and protection of human rights, where each component defines itself, complements and depends on the others for its meaning¹ finds apt expressions in the Bangladesh Constitution.

This chapter focuses on governance in the public sector, given its relationship with government institutions and the ways in which they function, take and implement decisions, deliver services, and set boundaries that inform the relationships between citizens and public officials. While the government is composed of a set of institutions founded by the constitution and laws, governance, for the purposes of this chapter, essentially refers to behavioral relationships between those who govern – the government and those who are governed – the citizens. Human rights, on the other hand, 'constitute an important aspect of national and international political agenda as they require governments to conform to acceptable standards of behavior in their treatment of and interaction with the citizens, and which affect the relationship governments with other States and relevant international fora.'²

Although governance and human rights are *prima facie* distinct concepts, they are inextricably linked in their interpretation and application. It is now firmly established that human rights require an enabling environment in order to be effective. An enabling environment in this context would signify the existence of appropriate legislation, policies, institutions, and procedures guiding the actions of the state in protecting human rights and for holding perpetrators of human rights violations to account. While good governance holds the key to a conducive environment in which human rights may flourish, human rights, in turn strengthen the good governance framework in a given society by prescribing standards and values for the government to draw on when developing legislative frameworks, policies, and programmes.

Significant developments have taken place in the realm of governance and human rights in Bangladesh since its independence in 1971. Drawing strength and legitimacy from the Constitution, governance and human rights in Bangladesh have navigated trajectories within the institutional, legal and policy landscape to produce a mixed bag of some good and some not so favorable experiences. This paper attempts to study how the Constitution of Bangladesh balances fundamental rights and fundamental principles of state policy to ensure good governance, preserve the

¹ Scott Davidson, *Human Rights* (Open University Press 1993) 165.

² Background Paper for the 7th Five Year Plan of the Government of Bangladesh: Governance and Justice, Manzoor Hasan, Jonathan Rose and Sumaiya Khair. See <https://gedkp.gov.bd/wp-content/uploads/2021/02/12_Governance-and-Justice-_Final-Draft.pdf?post_id=810> accessed 12 March 2023.

rule of law and examine the institutional, legal and policy framework, practices and challenges that have over the years shaped the culture of governance and human rights in the country.

8.2 The Bangladesh Constitution on Human Rights and Good Governance

Human rights have progressively made their way into innumerable national constitutions and soon emerged as a standard benchmark regulating the relations between the state and its citizens. The Constitution of Bangladesh is no exception. The history of Bangladesh reveals progressive struggles for democracy and representation which have laid the foundation for human rights, the rule of law, equality, and justice. The war of liberation in 1971 marked the exercise of the right to self-determination and a fresh start to human rights activism in Bangladesh. On 17 September 1974, Bangladesh became the 136th member of the UN and swore adherence to the Universal Declaration of Human Rights (UDHR) 1948.³ Adherence to the UDHR finds expression in the Preamble of the Constitution of Bangladesh which pledges that

...[I]t shall be the fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation—a society in which the rule of law, fundamental human rights and freedom, equality and justice, political and social, will be secured for all citizens.⁴

Although human rights are distinct from constitutional fundamental rights,⁵ the Constitution of Bangladesh catalogues an impressive array of fundamental rights, all of which resonate the core human rights envisaged in international human rights instruments. The Constitution places safeguards against abuse of civil and political rights by guaranteeing, *inter alia*, equality before law and equal protection of law,⁶ protection of life and liberty⁷ and prohibits discriminatory treatment and forced labour.⁸ The Constitution also guarantees rights during arrest, detention, trial, and

³The UDHR is recognised as a statement of general principles expounding the meaning of the phrase ‘human rights and fundamental freedoms’ envisaged in the UN Charter.

⁴The Constitution of Bangladesh, *Preamble*.

⁵Human rights are those rights which apply to all human beings for the simple reason that they are born human beings and as such, have universal relevance, whereas fundamental rights, though also human rights, are mandated by the constitution and applies to citizens of a particular country. The expression ‘fundamental rights’ signifies that they are guaranteed by the constitution, which commands supremacy over all other laws of the land.

⁶The Constitution of Bangladesh, *Article 27*.

⁷The Constitution of Bangladesh, *Article 32*.

⁸The Constitution of Bangladesh, *Article 34*.

punishment.⁹ Specific liberties of speech and expression,¹⁰ movement,¹¹ association¹² and assembly,¹³ trade and occupation,¹⁴ religion¹⁵ and property,¹⁶ security of home and privacy¹⁷ are also guaranteed. ‘Taken together, these rights pave the way for a just, free, and egalitarian society.’¹⁸

Undeniably, the guarantees to civil, political, and social rights are crucial for creating conducive conditions for the development of the potential of human beings, which in turn, is vital for a democratic polity.¹⁹ Fundamental rights, in essence, constitute a general standard to be maintained by every government in the common interest of the people. The object of fundamental rights is not simply to ensure inviolability of certain essential rights against political changes, but also to impress upon the people the fact that they have attained a new level of national existence.²⁰

Just as international human rights law has the scope of limiting the application of human rights in exceptional circumstances, the Bangladesh Constitution too provides exceptions to the enforcement of the fundamental rights in particular situations. For example, article 45 states that no action can be taken to challenge derogation of fundamental rights in respect of any provision of a disciplinary law relating to members of a disciplined force.²¹ This saving clause is limited to the purpose of ensuring proper discharge of duties of the members of the disciplined force or maintenance of discipline in that force. Again, the declaration of an emergency shall automatically suspend the fundamental rights guaranteed by articles 36–40 and 42²² and any law made during the emergency shall not be void because it is inconsistent with any of the fundamental rights envisaged in the articles referred to. The suspension of these fundamental rights shall remain in force so long as the emergency is not formally lifted.

⁹The Constitution of Bangladesh, *Article 33 and 35*.

¹⁰The Constitution of Bangladesh, *Article 39*.

¹¹The Constitution of Bangladesh, *Article 36*.

¹²The Constitution of Bangladesh, *Article 38*.

¹³The Constitution of Bangladesh, *Article 37*.

¹⁴The Constitution of Bangladesh, *Article 40*.

¹⁵The Constitution of Bangladesh, *Article 41*.

¹⁶The Constitution of Bangladesh, *Article 42*.

¹⁷The Constitution of Bangladesh, *Article 43*.

¹⁸See <https://gedkp.gov.bd/wp-content/uploads/2021/02/12_Governance-and-Justice-_Final-Draft.pdf?post_id=810> accessed 12 March 2023.

¹⁹Dilara Choudhury, *Constitutional Development in Bangladesh. Stresses and Strains* (University Press Limited, Dhaka, 1994) 173.

²⁰TK Tope, *Constitutional Law of India* (Eastern Book Company, 1988) 32.

²¹‘Disciplined force’ connotes any force engaged in the defence of the country or the maintenance of the law and order.

²²The fundamental rights envisaged in these articles are freedom of movement, freedom of assembly, freedom of association, freedom of thought, conscience and speech, freedom of profession or occupation, and right to property respectively.

In addition to the fundamental rights, the Constitution sets out ‘the fundamental principles of state policy, which require the State to ensure *inter alia*, women’s participation in national life, free and compulsory education, public health, equality of opportunity, work as a right and duty, rural development and promotion of local government institutions and respect for international law.’²³ Although article 8(2) states that the Fundamental Principles of State Policy, unlike the Fundamental Rights, shall not be enforceable in court, it declares at the same time that these principles shall – a) be fundamental to the governance of the country, b) be applied by the state in the making of laws, c) be a guide to the interpretation of the Constitution and other laws of the country, and d) form the basis of the work of the state and of its citizens. Moreover, article 47(1) of the Constitution maintains that no law shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the fundamental rights, if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy.

Clearly, the Constitution maintains a fine balance between fundamental rights and fundamental principles of state policy where they appear to supplement each other in bringing about social change and ensuring good governance and human rights. Drawing on this, the Supreme Court of Bangladesh has, on several occasions, upheld these fundamental principles in protecting economic and social rights of citizens. Indeed, judicial enforcement is not the only means of enforcing a particular rule, but public opinion is also often an effective mechanism for enforcing certain principles. This is in conformity with the idea of popular sovereignty where accountability to enforce these principles is left to the political process.²⁴

8.3 Drivers of Good Governance and Human Rights: State and Non-state Actors

The incorporation of fundamental rights and governance provisions into a constitution does not by itself ensure good governance and human rights protection. There is a need for concrete and constitutionally mandated institutions to enforce them. While some state driven mechanisms are provided for by the Constitution and domestic law, non-state actors have emerged over the years to advocate for human rights and good governance.

The key state institutions which promote and help safeguard human rights and good governance are the Parliament (which oversees government functions and demands accountability), the Supreme Court (which enforces fundamental rights

²³ See <https://gedkp.gov.bd/wp-content/uploads/2021/02/12_Governance-and-Justice-_Final-Draft.pdf?post_id=810> accessed 12 March 2023.

²⁴ Muhammad Ekramul Haque, ‘Legal and Constitutional Status of the Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh’ (2005) 16(1) *Journal of the Faculty of Law, The Dhaka University Studies* (Part- F) 45–80, 79.

envisaged in the Constitution), the Office of the Attorney General (which represents the Government in the judicial process), the Office of the Auditor and Comptroller General (which conducts audits of the Republic, government agencies, public bodies and public companies and thereby ensures accountability and transparency of the government in the use of public resources), the Public Administration (which is the primary policy/decision-making and administrative body of the government) and the Police (which maintain law and order in the country and also assist in criminal justice administration).

Bangladesh has several statutory bodies which oversee and contribute to the implementation of good governance and human rights. The Anti-Corruption Commission Act (ACC) is mandated to combat corruption. The National Human Rights Commission (NHRC) is empowered to receive and investigate allegations of human rights violations and if proved, settle the matter or refer it to Court/relevant authorities, as the case may be. The Information Commission protects the citizens' right to information. The Law Commission recommends legal reforms that have implications for human rights and good governance.

Amongst the non-state actors, the media (print, electronic and social media) have been instrumental in flagging governance failures and human rights violations and creating space for holding the government accountable for acts or omissions that undermine good governance and human rights. Bangladesh has a vibrant civil society comprising of NGOs, think tanks, academia, and business associations, which have historically played a critical role in the democratisation process of the country by demanding government accountability through transparency, participation, and democratic governance. International development partners and bilateral agencies have strengthened the agenda for good governance and human rights in Bangladesh by providing technical support to relevant stakeholders within and outside of the government and by tenaciously stressing on the importance of good governance, human rights, access to information, police and judicial reforms, democratisation and development of local government capacities for improved governance.²⁵

8.4 Fifty Years Down the Line: Factors Impeding Constitutional Safeguards of Good Governance and Human Rights

In the 50years since independence, Bangladesh has achieved many things for which it can be proud. It has made commendable strides in terms of GDP growth and socio-economic indicators. The country's GDP growth has been estimated at 8.1% in FY2019, up from 7.9% in FY2018 and the economy is projected to maintain

²⁵ Sumaiya Khair, *Towards a Fairer World: Why is Corruption Still Blocking the Way? Bangladesh Case Study* (Transparency International 2006) 15.

GDP growth above 7% in the coming years.²⁶ Bangladesh has been showing better performance than comparable countries in South Asia and beyond in respect of indicators such as, Human Development Index (HDI), Multidimensional Poverty Index (MPI), Gender Development Index, population growth reduction and life expectancy at birth.²⁷ Bangladesh is also believed to have performed well in implementing the MDGs, and is expected to do equally well in achieving the commitments under the Sustainable Development Goals (SDGs).

In contrast, its performance in terms of governance and human rights indicators have not been as robust evidenced by inter alia, corruption, weakening and politicisation of the key institutions of accountability, erosion in the rule of law, and slack regulatory control. Concerns about human rights abuse including enforced disappearances, extra-judicial killings, and torture in custody are frequently documented and reported nationally and internationally, but hardly duly addressed. Collusion and ineffectiveness of a section of the administration, law-enforcement agencies and other vested quarters are increasingly tarnishing the image of Bangladesh as tolerant and diverse society. This section examines several plausible factors which may have contributed to some of the existing gaps and deficits.

8.4.1 *Lack of Parliamentary Oversight*

Notwithstanding constitutional powers, the Parliament of Bangladesh has often fallen short of public expectations in terms of representing the will of the people and strengthening democratic practices. The powers of executive oversight are not utilised effectively, government policies and critical issues are not befittingly discussed, and in the absence of critical and strong opposition parties, Parliament is unable to act independently of Executive control. The law-making process is devoid of informed debates and discussion; besides, most bills are initiated by the government, which receive quick and tacit approval, without any in-depth inquiry into the substance of the bill. There have been allegations against certain members of parliament (MPs) for using their office and influence on securing personal gains. The issue of conflict of interest amongst members of parliament MPs has time and again been raised in the media and public forums. Actions against errant MPs are

²⁶ ‘Global Economic Prospects: South Asia’ <<http://pubdocs.worldbank.org/en/659151574888067580/Global-Economic-Prospects-January-2020-Regional-Overview-SAR.pdf>> accessed 25 June 2022.

²⁷ See <<https://hdr.undp.org/data-center/human-development-index#/indicies/HDI>> accessed 14 July 2022; <<https://hdr.undp.org/data-center/specific-country-data#/countries/BGD>> accessed 14 July 2022; <<https://hdr.undp.org/gender-development-index#/indicies/GDI>> accessed 14 July 2022; <<https://hdr.undp.org/content/2021-global-multidimensional-poverty-index-mpi#/indicies/MPI>> accessed 14 July 2022; World Bank Data, ‘Population growth (annual %)’ <<https://data.worldbank.org/indicator/SP.POP.GROW?locations=BD>> accessed 25 June 2022; World Bank Data, ‘Life expectancy at birth, total (years) – Bangladesh’ <<https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=BD>> accessed 25 June 2022.

non-existent. Overall, Parliament has not been able to deliver on its key tasks of representation, legislation, oversight of the Executive, and conflict resolution, thereby contributing insufficiently to good governance.²⁸

8.4.2 *Bottlenecks in Justice Delivery*

One of the key pre-requisites of good governance and human rights is the guarantee of a fair and equitable legal process whereby people, irrespective of social and economic status, can resolve their disputes/problems. This requires a robust judicial system through which people can challenge arbitrary executive actions and exercise their rights under the law and the Constitution. In Bangladesh, the legal system, symbolised by courts, lawyers and archaic laws, has historically remained beyond the reach of the common people, who harbour a general mistrust towards legal and judicial institutions. Complicated procedures, cumbersome processes, exorbitant litigation costs, a distinct bias for the moneyed and the powerful and inordinate delays in justice dispensation are some of the major factors that discourage the common people from accessing justice in formal courts. The lack of a reliable and expeditious justice system not only adversely affects the exercise of citizen's fundamental rights but also retards growth and development of the country.²⁹

Erosion in judicial independence is another facet that impedes speedy and impartial justice dispensation. Judicial independence in Bangladesh was compromised every time a military government came to power and when it experienced interference from executive organ of the state and political manipulation during successive political governments. Although the separation of the magistracy from the executive seemingly mitigated some of the concerns, it has not met the standards of a truly independent institution, as the subordinate courts continue to be influenced by the executive. Beleaguered by controversial appointments, promotions, removals, and conduct of Judges, Public Prosecutors and Attorney Generals, the judicial process has been critiqued for lacking in accessibility, objectivity, transparency, and accountability, for its inability to adjudicate impartially, particularly in politically charged cases, thereby impeding the potentials for judicial activism for human rights and rule-based governance.

²⁸Taiabur Rahman, 'Governance and Parliament: Does Jatiyo Sangshad Matter in Promoting Good Governance in Bangladesh' in Salahuddin Aminuzzaman (ed), *Governance and Development. Bangladesh and Regional Experiences* (Shravan Publishers, Dhaka, 2006), 33–56, 41.

²⁹Sumaiya Khair, *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements and Challenges* (Colorline, 2008a).

8.4.3 *Unbridled Powers of the Police and Special Forces*

The integrity of the legal system is impaired when law-enforcing agencies miscarry their duties and misuse the power vested in them by law.³⁰ The police administration frequently draws flak for its anti-people policing strategy characterised by indifference to people's needs, inefficient investigations, the filing of false cases, arbitrary arrests, maltreatment during arrest and detention, corruption, and subservience to vested interest groups. Bribes, rent- seeking and extortion by the police are commonplace.³¹ Police operations, including criminal investigations, lack transparency and are often manipulated by the rich and powerful, including political leaders,³² resulting in injustices in determining who would be charged and for what crime.³³ The police are given to fabricating cases and distorting facts while recording complaints with the intention of extorting money from targeted individuals and/or setting the actual offender free.³⁴ Consequently, the police are no longer viewed as the custodian of law and order, but rather, as perpetrators of crimes and human rights violations against innocent citizens.

The creation of elite security forces at different times, namely, Cheetah, Cobra, and Rapid Action Battalion, (popularly known as RAB) has been a perturbing feature of the criminal justice administration in Bangladesh. Their clandestine operations have resulted in extra-judicial killings, deaths of alleged criminals and terrorists in 'cross-fires', and enforced disappearances.³⁵ One of the more troubling aspects of RAB operations is the absence of transparency, accountability and due process ostensibly in the interest of securing law and order. Indeed, it has been pointed out that by combining the role of judge, jury and executioner, RAB breaches the most fundamental principle of a democratic order—the separation of powers.³⁶

³⁰ Sumaiya Khair, 'Challenges to democratization: perspectives of structural malgovernance in Bangladesh' in VA Pai Panandiker and Rahul Tripathi (eds), *Towards Freedom in South Asia. Democratization, Peace and Regional Cooperation* (Konark Publishers Pvt. Ltd., 2008b) 55.

³¹ See Corruption in Service Sectors: National Household Survey 2017 (Transparency International Bangladesh) <<https://www.ti-bangladesh.org/beta3/index.php/en/research-policy/93-household-survey/5666-corruption-in-service-sectors-national-household-survey-2017>> accessed 25 June 2022.

³² *The State of Human Rights in Bangladesh in 2010*, Asian Human Rights Commission, 29, <<http://www.humanrights.asia/wp-content/uploads/2018/07/AHRC-SPR-001-2010-Bangladesh.pdf>> accessed 20 July 2022.

³³ *ibid.* 36.

³⁴ *ibid.*

³⁵ *2020 Country Reports on Human Rights Practices: Bangladesh* (US Department of State 2020), <<https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/bangladesh/>> accessed 26 December 2021.

³⁶ Abu Abdullah, 'One and a Half Cheers for RAB' *The Daily Star* (Dhaka, 14 March 2005) reproduced in Ain o Salish Kendra (ASK) 94–96 <https://www.askbd.org/RAB/News_8.pdf> accessed 5 July 2022.

8.4.4 Repressive Laws

Draconian laws inherited from the British colonial and the Pakistani eras remained in force or have been supplemented by amendments or new enactments after independence of Bangladesh. A few examples are highlighted here. Adopted on 22 September 1973, the Second Amendment to the Constitution inserted Part IXA to the Constitution which limited the constitutional protection from arrest and detention. Article 141C empowers the President to suspend the right to move the courts for the enforcement of any of the fundamental rights guaranteed in the Constitution during a state of emergency. Provisions in the Code of Criminal Procedure, 1898 (section 54) and the Special Powers Act, 1974 in Bangladesh entitle the police to arrest anyone without a warrant for breach of peace and mere suspicion of acts subversive to the state. The Special Security (SSF) Force Ordinance of 1986 similarly empowers an officer of the Force to arrest any person without warrant if there is reason to believe that such person would be prejudicial to the physical security of the President or the Prime Minister or such very important person. Attempts to resist or evade arrest may be met with appropriate measures, including the use of force to the extent that it may result in death.

SSF members enjoy wide immunity as their actions cannot be challenged in any court. 'While the law requires those taken into custody to be produced before the Magistrate within 24 hours of their apprehension, this is not done in practice.'³⁷

The Government inserted section 505A in the Penal Code of 1860 to prevent publication of content that may be prejudicial to the interests of the security of Bangladesh or public order or to the maintenance of friendly relations of Bangladesh with foreign states or to the maintenance of supplies and services essential to the community. This provision greatly curtailed press freedom. Section 99A was added to the Code of Criminal Procedure of 1898, which broadened the scope of defamation, and enabled the Executive organ to ban and seize all kinds of publications and detain citizens. Besides, the police systematically abuse various provisions of the Code to arbitrarily detain, harass, and prosecute citizens.

The Contempt of Court Act of 1926 is often used to suppress critics of the Government. The Armed Police Battalions (Amendment) Act of 2003 was promulgated to create the Rapid Action Battalion (RAB). This law grants RAB with wide powers for gathering intelligence in respect of a crime and criminal activities and investigating any offence on the direction of the Government and as such, are authorised to operate arbitrarily without legal sanctions.³⁸

The Information and Communication Technology Act 2006 is seen as an instrument to suppress critical voices in the country. Its vaguely constructed

³⁷ See <https://gedkp.gov.bd/wp-content/uploads/2021/02/12_Governance-and-Justice-_Final-Draft.pdf?post_id=810> accessed 12 March 2023.

³⁸ *Shrinking Democratic Space and Freedom of Expression in Bangladesh* (Forum-Asia 2018) <https://www.forum-asia.org/uploads/wp/2018/12/Shrinking-Democratic-Space-and-Freedom--of-Expression-in-Bangladesh_Dec-2018.pdf> accessed 25 June 2022.

provisions empower the authorities to prosecute people ‘in the interest of sovereignty, integrity or security of Bangladesh’ or if they are deemed to ‘prejudice the image of the State’ or ‘hurt religious belief’.³⁹ The Information and Communication Technology (Amendment) Act of 2013 is one of the main tools used against dissidents. The Digital Security Act (DSA) 2018 endows the law enforcement agencies with ‘arbitrary powers to conduct searches, seize devices and their contents, and arrest individuals without warrant for comments made online, in violation of the right to freedom of expression enshrined under the International Covenant on Civil and Political Rights (ICCPR) to which Bangladesh is Party.’⁴⁰

8.4.5 Corruption

According to Transparency International’s annual Corruption Perception Index (CPI), Bangladesh continues to be ranked among countries where corruption is perceived to be most pervasive.⁴¹ Corruption is believed to predominate in contexts where public officials enjoy unfettered discretion, where governmental activities lack accountability and transparency and where the private sector and civil society institutions are weak and ineffective.⁴² While much of the focus has traditionally been on public sector corruption, there is growing evidence of corruption in the private sector and the resulting collusion between public and private sector actors for private gain. Indeed, corruption ‘hurts the poor disproportionately by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice...’⁴³ Its bias against the poor and socially excluded groups (women, indigenous communities, minorities) becomes manifest when these vulnerable groups are compelled to make unauthorised payments to access public services like education, health, justice, and basic utilities of standard quality. In 2000, the World Bank estimated that ‘if Bangladesh could

³⁹ Section 57 of the Information and Communication technology Act 2006.

⁴⁰ See <<https://www.amnesty.org/en/latest/press-release/2021/07/bangladesh-end-crackdown-on-freedom-of-expression-online/>> accessed 12 March 2023.

⁴¹ According to Corruption Perceptions Index (CPI) 2020, Bangladesh has scored 26 out of 100, the same as in 2019. Counting from the bottom, Bangladesh has been ranked 12th, two steps lower than the 14th in 2019. It has once again been ranked the second lowest in South Asia, better only than Afghanistan. Bangladesh remains the 4th lowest among 31 countries in the Asia-Pacific region, and its score continues to be well below the global average of 43.

⁴² Alan Doig and Stephen Riley, ‘Corruption and Anti-Corruption Strategies: Issues and Case Studies from Developing Countries’ in *Corruption and Integrity Improvement Initiatives in Developing Countries*, 49, <<http://www.anti-corruption.org/wp-content/uploads/2016/11/Corruption-and-anti-corruption-strategies-Issues-and-case-studies-Doig-1998.pdf>> accessed 14 July 2022.

⁴³ Kofi Annan, ‘Foreword’ in The United Nations Convention Against Corruption, General Assembly resolution 58/4 of 31 October 2003 <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> accessed 25 June 2022.

reduce its corruption level to those prevailing in countries with highest reputation for honest dealing, it could add between 2.1 and 2.9 percent to annual per capita GDP growth. This would contribute to a sustainable reduction in poverty'.⁴⁴ Corruption also impedes human rights and justice by undermining the rule of law and incriminating in favour of the moneyed and powerful.

8.4.6 Politicisation of Public Administration

Political patronage by the major parties has permeated nearly all key state institutions in ways that seriously undermine the accountability structures, not least the public administration. While inefficiency in government/public service has often been attributed to low salaries of officers and the lack of incentives, politicisation of the system over the years has systematically eroded the integrity of public functionaries.⁴⁵ Politicisation is manifest when the promotion, transfer, and recruitment of civil servants are based not on their merit, quality, competence, and performance, but on loyalty to the party in power. The practice of placing officers who do not toe the partisan line on 'officer on special duty' (OSD) has now become a tool for punishing non-conformists. Professional advancement of public officials is tied to having the 'right connections' in the political leadership. Even though bureaucrats are essentially 'public servants', their unashamed allegiance to the ruling party, the trend of engaging in politics after completion of their service and competing for parliamentary seats have been undermining their professional ethos. The Constitution emphasises on good governance in the civil bureaucracy, epitomised by accountability and professional culture in furtherance of public good. Although actors in governance are expected to be transparent, fair, impartial, professional, incorrupt, and impervious to the party in power and be committed to the people's welfare, the ground reality is quite different.

8.4.7 Weak Accountability Institutions

Despite being statutory bodies and mandated to function independently, the Commissions have by and large failed to meet the expectations of the public. Since its inception, the Anti-Corruption Commission (ACC) has demonstrated a lack of initiative in investigating allegations, particularly when they involved ruling party men, and has largely concentrated on going only after the small fry. Often dubbed as a 'toothless tiger', the ACC suffers from structural, institutional, and political impediments,

⁴⁴ *Corruption in Bangladesh: Costs and Cures* (World Bank 2000).

⁴⁵ See <https://gedkp.gov.bd/wp-content/uploads/2021/02/12_Governance-and-Justice-_Final-Draft.pdf?post_id=810> accessed 12 March 2023.

which have essentially affected its overall performance and effectiveness. Its leadership quality and the degree of professional excellence, integrity and credibility of its staff have often been questioned by concerned stakeholders.⁴⁶

Progress has been slow in the work of the Information Commission's work, and it is yet to demonstrate its effectiveness. It has not been particularly successful in proactively seeking information from the government and others on issues of national interest, processing appeals, coordinating right to information (RTI) related activities, and identifying the challenges facing both the demand and supply sides of implementation of the RTI law. Indeed, the Commission's ability to play an effective oversight role has often been compromised by inadequate leadership, and non-cooperation by public authorities.

Ineffectual in carrying out its role and mandate, the National Human Rights Commission (NHRC) has failed to live up to the expectations of the people and relevant stakeholders. Despite its efforts to raise human rights awareness and advocate for change, the impact on the ground is not particularly visible. Its work has been compromised by weak investigations, inadequate staffing with requisite knowledge, and inability to respond to the growing number of complaints. The NHRC often faces non-cooperation from select organs of the government. It has not demonstrated any inclination to investigate alleged acts of torture and ill-treatment committed by state security forces. As the High Court Division of the Supreme Court commented on 24 June 2020, while passing a judgment on a Writ Petition filed in 2013: 'The National Human Rights Commission has shown extreme incompetence in fulfilling its responsibilities to prevent human rights violations, and the Commission is sleeping with eyes wide open'.⁴⁷

8.4.8 *Shrinking Civil Society Space and Intolerance to Dissent*

The engagement of civil society with the government on different platforms to inform policy development has been an important aspect of democratic governance in Bangladesh. This process has been instrumental in conveying to policymakers the needs of the people on the ground and assisting them in devising meaningful and realistic policies. Recent times have however, seen a shrinking of political space for citizens generally, and civil society and the media in particular. Bangladesh has slipped in the CSO Sustainability Index for the fifth consecutive time, scoring a 4.00 in 2020 starting from a score of 3.5 in 2015.⁴⁸ Several factors have contributed to this

⁴⁶Salahuddin M Aminuzzaman and Sumaiya Khair, *Governance and Integrity. The National Integrity System in Bangladesh* (University Press Limited, Dhaka, 2017) 211.

⁴⁷*Human Rights in Bangladesh: A Mid-Term Assessment of the Implementation during the UPR Third Cycle* (Joint Submission by the Solidarity Group for Bangladesh to the Working Group on the Universal Periodic Review 2020) 7.

⁴⁸See 'Bangladesh continues to slip in CSO sustainability index for 5 straight years' (*HTDS Content Service*) <<https://www.htsyndication.com/united-news-of-bangladesh/article/bangladesh-continues-to-slip-in-cso-sustainability-index-for-5-straight-years/56849985>> accessed 22 December 2021.

development. For example, the Foreign Donations (Voluntary Activities) Regulation Act passed by Parliament in 2016 contains elements that have the potential to restrict free speech and impede civil society activities. The law has a provision for cancelling or withholding registration of an NGO for ‘making derogatory comments about the Constitution and constitutional institutions’ (section 14).

Constitutional institutions essentially include the Offices of the President and the Prime Minister, the Parliament, and the Supreme Court. This provision is considered to be particularly controversial given its potential for intimidating and silencing human rights defenders and NGOs advocating for good governance and human rights. Similar concerns prevail with regard to the Information Communication and Technology (ICT) Act 2006, and the Digital Security Act 2018. Both legislations have provisions that discourage voice and dissent. While a section of the media does report on human rights violation and governance deficiencies, it, at the same time, exercises a degree of self-censorship in a space of control and intimidation. In the wake of these developments, civil society has now become polarised. Some civil society groups protect themselves by siding with the government and thereby participating, albeit unproductively, in the agenda setting and policy formulation process, while others maintain a distance and try to hold the government accountable, despite the risk of being labelled as ‘stooges of the opposition’.⁴⁹

8.5 Conclusion

Good governance and human rights lie at the core of the Bangladesh Constitution. Its provisions could be studied from multi-dimensional perspectives—institutional, democratic, political, ethical and above all, legal.⁵⁰ Taken together, the constitutional provisions guarantee unequivocal protection of the citizens against arbitrariness in governance, establish institutions through which the government functions and through which the citizens may demand redress and accountability, expound principles which are pivotal to the well-being of the state and citizens, and provide a strong anchor on which the legal system of the country hinges. From a human rights perspective, good governance refers to the process whereby the government and its agencies conduct public affairs, manage public resources, and guarantee the protection of human rights. Clearly, the full enjoyment of human rights is dependent on good governance being in place. Unless good governance is promoted and practiced, the realisation of human rights, in the strict sense of the term, is likely to remain elusive.

Bangladesh has come a long way in the last 50 years. It would have achieved far more in terms of growth and socio-economic transformation if it could have ensured higher standards of governance and human rights, especially through the promotion and practice of the rule of law, integrity, and accountability. Central to this vacuum

⁴⁹ Bertelsmann Stiftung, *BTI 2020 Country Report — Bangladesh* (Bertelsmann Stiftung, Gütersloh, 2020).

⁵⁰ *Human Rights and Constitution Making* (Office of the United Nations High Commissioner for Human Rights 2018).

is the lack of political will, which is widely recognised as a major stumbling block in ensuring accountable governance and protecting human rights. Although Bangladesh has a reasonably elaborate constitutional, legal, institutional, and policy framework in place, including the national integrity system, many of which may naturally be updated as needed, deficits in the enforcement of the same without fear or favour presents serious challenges to effectively securing governance and human rights. It is not so much the lack of laws and policies that hinders the implementation of good governance and human rights in Bangladesh, but rather a deep-seated irreverence for the rule of law, constitutional safeguards, and integrity practice, and that too with impunity.⁵¹ Indeed, when wrongful acts escape punishment or censure, and are repeated without consequence, it implies a tacit approval by the State authorities of the morality of the acts.⁵² In such a situation, the relationship between the State and its citizens, people's perception of state institutions and the manner in which the State engages with its citizens have serious consequences for good governance and human rights.⁵³

Indeed, the role of the government in power in constitutional implementation cannot be over-emphasised. Laws, policies, and institutional developments alone cannot fulfil constitutional obligations in respect of governance and human rights; the government must simultaneously ensure that deficiencies in governance and deprivations of human rights are avoided in running its business. Even the best constitution cannot guarantee dispassionate implementation of good governance and human rights without accountable political leadership and enlightened law and policymaking and without willingness of the government actors to sacrifice aspirations for immediate personal gain for the wider and longer-term public good.

References

Books

- Aminuzzaman, Salahuddin M., and Sumaiya Khair. 2017. *Governance and Integrity. The National Integrity System in Bangladesh*. Dhaka: University Press Limited.
- Choudhury, Dilara. 1994. *Constitutional Development in Bangladesh. Stresses and Strains*. Dhaka: University Press Limited.
- Davidson, Scott. 1993. *Human Rights*. Buckingham: Open University Press.
- Khair, Sumaiya. 2006. *Towards a Fairer World: Why is Corruption Still Blocking the Way? Bangladesh Case Study*. Berlin: Transparency International.
- . 2008a. *Legal Empowerment for the Poor and the Disadvantaged: Strategies, Achievements and Challenges*. Colorline.
- Tope, T.K. 1988. *Constitutional Law of India*. Lucknow: Eastern Book Company.

⁵¹ See <https://gedkp.gov.bd/wp-content/uploads/2021/02/12_Governance-and-Justice-_Final-Draft.pdf?post_id=810> accessed 12 March 2023.

⁵² Ibid.

⁵³ Ibid.

Chapters in Edited Books

Khair, Sumaiya. 2008b. Challenges to democratization: perspectives of structural malgovernance in Bangladesh. In *Towards Freedom in South Asia. Democratization, Peace and Regional Cooperation*, ed. V.A. Pai Panandiker and Rahul Tripathi, 55. New Delhi: Konark Publishers Pvt. Ltd.

Articles

Haque, Muhammad Ekramul. 2005. Legal and Constitutional Status of the Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh. *Journal of the Faculty of Law, The Dhaka University Studies* (Part – F) 16 (1): 45–47.

Internet Sources

Abdullah, Abu. 2005. One and a Half Cheers for RAB. *The Daily Star* (Dhaka, 14 March 2005) reproduced in Ain o Salish Kendra (ASK) 94–96. https://www.askbd.org/RAB/News_8.pdf. Accessed 5 July 2022.

Kofi Annan. 2003. 'Foreword' in *The United Nations Convention Against Corruption, General Assembly resolution 58/4 of 31 October 2003*. http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf. Accessed 25 June 2022.

Bertelsmann Stiftung. 2020. *BTI 2020 Country Report — Bangladesh*. Gütersloh: Bertelsmann Stiftung.

Corruption in Bangladesh: Costs and Cures. (World Bank 2000).

Corruption in Service Sectors: National Household Survey. 2017. (Transparency International Bangladesh). <https://www.ti-bangladesh.org/beta3/index.php/en/research-policy/93-household-survey/5666-corruption-in-service-sectors-national-household-survey-2017>. Accessed 25 June 2022.

Global Economic Prospects: South Asia. 2022. <http://pubdocs.worldbank.org/en/659151574888067580/Global-Economic-Prospects-January-2020-Regional-Overview-SAR.pdf>. Accessed 25 June 2022.

Human Rights and Constitution Making. (Office of the United Nations High Commissioner for Human Rights 2018).

Human Rights in Bangladesh: A Mid-Term Assessment of the Implementation during the UPR Third Cycle. (Joint Submission by the Solidarity Group for Bangladesh to the Working Group on the Universal Periodic Review 2020) 7.

Shrinking Democratic Space and Freedom of Expression in Bangladesh. (Forum-Asia 2018). https://www.forum-asia.org/uploads/wp/2018/12/Shrinking-Democratic-Space-and-Freedom-of-Expression-in-Bangladesh_Dec-2018.pdf. Accessed 25 June 2022.

The State of Human Rights in Bangladesh in 2010. (Asian Human Rights Commission 2010). <http://www.humanrights.asia/resources/hrreport/2010/AHRC-SPR-001-2010.pdf>. Accessed 6 June 2021.

Sumaiya Khair PhD is Professor of Law at Dhaka University, where she was Chair of the Law Department (2009–11). She obtained her PhD from UK, where she studied as a Commonwealth Post-Doctoral Academic Fellow. Her research interests include human rights, humanitarian law, child rights, legal empowerment, refugee and migration, governance, labour standards, and gender issues, and has published in national and international journals and books. She is an editorial board

member of *The Asian Yearbook of International Law* of the Foundation for the Development of International Law in Asia (DILA) and sits on DILA's Governing Board. She officiated as one of the Judges of Asian Human Rights Court Simulation, established by the Chang Fo-Chuan Center for the Study of Human Rights in Taipei in the first ever case tried in July 2019 in Taipei, Taiwan. Professor Khair sits on governing boards of several development and research organisations in Bangladesh, provides strategic advice on policy, programmes, fund-raising and operations; serves as a resource person in national, regional, and international forums and has consulted for UN agencies, ILO, ADB, and various international development partners. She advises Transparency International Bangladesh, accredited chapter of the Berlin-based anti-graft organisation, Transparency International, on policy and programme.

Chapter 9

Mechanisms for Judicial Accountability in the Contemporary World: Whither Bangladesh?



Sarkar Ali Akkas

Abstract Judicial accountability seeks to ensure that all judicial decisions are made impartially and with efficiency and integrity. The mechanisms for judicial accountability are very crucial to make judges accountable for their judicial conduct and performance. In Bangladesh, there is no specific system or exclusive procedure for making complaints against a transgressing judge. Consequently, it is almost impossible for the general public to file a complaint against a judge for incapacity or misconduct, particularly for corruption. This chapter argues that for the sake of ensuring justice free from corruption as well as of maintaining high standards of judicial conduct, there should be an accessible system to make complaints against judges. Some existing mechanisms that may be relied upon for ensuring judicial accountability in Bangladesh have some significant drawbacks and suffer from the lack of transparency. This chapter therefore concentrates on the need for a specific mechanism for judicial accountability and examines those which are operating around the world to make suggestions for the reform of the existing mechanisms in Bangladesh.

Keywords Judicial accountability · Mechanisms · Performance · Corruption · Public complaints · Transparency · Parliamentary oversight · Judicial commission/council

A major portion of the materials used in this chapter is taken from my PhD thesis completed in 2002 at the University of Wollongong, Australia.

S. A. Akkas (✉)

Department of Law, Jagannath University, Dhaka, Bangladesh

e-mail: aliakkas@gmail.com

9.1 Introduction

The accountability of public institutions or persons holding public offices means the obligation of public officials to explain, justify, and legitimise the use of power in discharging public duties.¹ The general public in a modern state expect that all governmental institutions will ‘operate with integrity and efficiency’.² In order to fulfil this expectation, all public institutions should be accountable for the exercise of legal powers and their performance of public duties.³ Since the judiciary is one of principal public institutions, it cannot be devoid of accountability and therefore, the judiciary is accountable to the society it serves.⁴ The accountability of the judiciary is essential to ensure that all judicial decisions are ‘made independently and impartially, with integrity and free of corruption’.⁵

This chapter highlights the need for a specific mechanism for judicial accountability and analyses the mechanisms for removal of judges operating around the world as well as the mechanisms existing in Bangladesh. Its main objective is to identify the drawbacks of the mechanisms for judicial accountability in Bangladesh and argue for the possible reforms toward a mechanism exclusively for ensuring judicial accountability to meet the expectation of the public.

9.2 Various Mechanisms for Judicial Accountability

The mechanism for judicial accountability depends largely on the political culture and social values of a society, and therefore, they may vary between countries. In order to identify the various mechanisms, one needs to take into consideration the different ways of ensuring judicial accountability in different jurisdictions as outlined below.

¹R Dhavan, ‘Judges and Accountability’, in R Dhavan *et al* (eds) *Judges and the Judicial Power* (Sweet & Maxwell 1985) 167.

²Murray Gleeson, ‘Judicial Accountability’, in *Courts in a Representative Democracy: A Collection of the Papers from a National Conference in Canberra* (The Australian Institute of Judicial Administration, 1994) 165.

³Sarkar Ali Akkas, *Independence and Accountability of Judiciary: A Critical Review* (Center for Rights and Governance, 2004) 34.

⁴*ibid.*

⁵Consultative Council of European Judges, ‘Position of the Judiciary and Its relation with the Other Powers of State in a Modern Democracy’ (2015) 4 CCJE [21] <<https://rm.coe.int/16807481a1>> accessed 28 April 2022.

9.2.1 *Discipline of Judges*

The discipline of judges is an important way of ensuring judicial accountability. In exercising judicial powers judges are obliged to maintain high standards of judicial performance and conduct. In the case of failure to maintain the standards they may be subject to disciplinary action, including suspension or removal from office.⁶ This accountability of judges is traditionally ensured by the executive and legislature, which actually act on behalf of the public to whom they are directly accountable for discharging their functions under constitutional or statutory law. In a modern democratic society, the public expect their judges to maintain the standards of judicial performance and judicial conduct. This expectation of the public has a close connection to the responsibilities of the executive and legislature for dealing with different aspects of the judiciary. Accordingly, when the executive or legislature takes any disciplinary action against a judge because of his/her incapacity or misconduct, it ultimately satisfies the expectation of the public.⁷

9.2.2 *Public Exposure of Judicial Functions*

Public exposure of judicial functions is a traditional form of judicial accountability. In exercising judicial functions all judges are under an obligation to act in full view of the public and to make judicial decisions after hearing both parties of the disputes.⁸ Apart from some exceptional situations, such as the proceedings in camera, judges are obligated to exercise judicial functions in open court where the public has free access. The exercise of judicial functions in open court is a cardinal feature which checks the arbitrary use of judicial powers and motivates judges to maintain the standards judicial performance.⁹ In the words of Jeremy Bentham:

Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.¹⁰

⁶ Akkas (n 3) 42.

⁷ *ibid* 37.

⁸ *ibid* 38–39; also, RD Nicholson, ‘Judicial Independence and Accountability: Can They Co-exist?’ (1993) 67 *Australian Law Journal* 404, 413.

⁹ Akkas (n 3) 38; Des Butler and Sharon Rodrick, *Australian Media Law* (LBC Information Services, 1999) 128.

¹⁰ John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, Constitutional Code, Book II, ch XII, sec XIV, vol X, 1843) 493.

Therefore, the public exposure of judicial functions is a substantial scrutiny for fair and efficient administration of justice and an effective means of enhancing and sustaining public confidence and respect for the judicial process.¹¹ It gives an opportunity for the public to scrutinise the performance and conduct of judges. However, the perception of the public relies on the media for information because the public seldom visit the courts to see and observe the judicial activities and conduct.¹² By reporting the activities of the judiciary the media plays a crucial role in forming public understanding of the courts and acts as a substitute for the general public and contributes to give substance to the principle of public hearings or open justice..¹³ Thus, judges may be accountable through public exposure of judicial functions, which is a traditional form of judicial accountability.

9.2.3 *Reasons for Judicial Decisions*

In resolving disputes judges are obligated to give full reasons for their judicial decisions and to express them publicly. The obligation to give reasons for judicial decisions is a requirement of good decision-making.¹⁴ Therefore, judges are bound to ‘explain their decisions based on the application of legal rules, through legal reasoning and findings of fact that are based on evidence and analysis’.¹⁵ The giving of reasons for judicial decisions is necessary for the satisfaction of the parties of their grievances. It helps the parties to appraise the decisions of judges and to assess whether there is any ground for an appeal. It may alleviate the grievances of the defeated party of a case.¹⁶

9.2.4 *Appellate Process*

The appellate process ensures the decisional accountability of subordinate court judges. Judicial decisions of the subordinate courts are generally subject to appeal to the superior courts.¹⁷ The appellate process is a means of reviewing judicial functions. The appellate courts may identify and correct judicial errors made by

¹¹ *Scott v Scott* (1913) AC 417, 463; Akkas (n 3) 39.

¹² Buttler and Rodrick (n 9) 129.

¹³ John Doyle, ‘The Well-Tuned Cymbal’, in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 42.

¹⁴ Buttler and Rodrick (n 9) 129; Akkas (n 3) 40.

¹⁵ International Commission of Jurists, *Judicial Accountability—A Practitioners’ Guide* (Geneva, 2016) 15.

¹⁶ Enid Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001) 226.

¹⁷ Nicholson (n 8) 404; Akkas (n 3) 41.

judges in making judicial decisions.¹⁸ Therefore, the appellate process encourages good decision-making and public acceptability of judicial decisions. Nevertheless, the appellate process is not an adequate mechanism for ensuring the accountability of judges.¹⁹ This is because an appellate court can rectify only departures from standards required to the administration of justice. The jurisdiction of an appellate court is mainly limited to ensure that justice is done according to law and the decisions of lower courts are regularly reached in conformity with proper procedural standards.²⁰ There are other limitations of the appellate process; for example, not every case is appealed. Furthermore, it may be overused or misused by the litigants because of the receptive judges at the appellate level. Hence, appeals are effective in the rectification of certain types of judicial errors or miscarriage of justice but cannot provide a complete system of making judges accountable for using judicial power.²¹

9.2.5 Scrutiny by Practising Lawyers

Judges may also be accountable through the scrutiny by the practising lawyers, which is crucial to make judges careful about their standards of judicial performance and conduct.²² Since the lawyers spend most of their time in the courtrooms, they observe the conduct and performance of judges very closely. Therefore, the scrutiny of judges by practising lawyers significantly contributes to checking performance and conduct of judges.²³

9.3 Disciplinary Mechanism in Practice

Judicial discipline is perhaps the most important mechanism to make judges accountable for their conduct and judicial performance. This mechanism is essential to check illegality and corruption in the administration of justice and to maintain high standards of judicial conduct and propriety in judges.²⁴ Judicial discipline is in fact penal proceeding against judges which involves performance appraisal and other actions necessary to ensure proper conduct and performance of judges.

¹⁸ Murray Gleeson, 'Judging the Judges' (1979) 53 *Australian Law Journal* 338, 343.

¹⁹ Akkas (n 3) 41.

²⁰ Anthony Mason, 'Justice at the Appellate Level' (A paper presented at the 10th South Pacific Judicial Conference, Vanuca Island, Fiji, 28 May 1993) 4.

²¹ Elizabeth Handsley, 'Issues Paper on Judicial Accountability', (2001) 10 *Journal of Judicial Administration* 181, 192.

²² *ibid.* 192; Akkas (n 3) 43.

²³ Akkas (n 3) 43.

²⁴ *ibid.* 188.

The actions may be of different kinds, including censure, reduction to a lower rank and salary, forced transfer, compulsory retirement, and removal.²⁵

It is almost universally recognised that the power of disciplining judges should not be vested exclusively in the executive government. This is because such a disciplinary control may place judges in a position of subservience to the executive.²⁶ Conversely, in order to ensure the accountability of judges in an effective manner, the disciplinary power should not be vested exclusively in the judiciary. Therefore, the power of judicial discipline should be vested in mechanisms which can ‘promptly, effectively and fairly deal’ with the discipline of judges.²⁷ In most jurisdictions the power to discipline judges is exercised by the executive government involving parliament, judiciary, judicial commission, judicial council, or some sort of disciplinary bodies.²⁸ An overview of the disciplinary mechanisms which are in practice in the contemporary world around is given below.

9.3.1 *Parliamentary Involvement in Disciplining Judges*

The discipline of judges through parliamentary involvement can be used by the procedure of impeachment or address of parliament. The procedure of impeachment is in fact the trial of a judge by parliament and under this procedure parliament itself can take disciplinary action against judges.²⁹ An impeachment procedure consists of two stages: first, the adoption of articles of impeachment by the legislature; and secondly, the trial of the accused judge. For this purpose, the house may be ‘presided over by a judge rather than its usual president; otherwise, a special court may be convened for this purpose’.³⁰ The procedure of address empowers the executive government to remove judges upon the address of house(s) of parliament. This system was the ‘traditional English practice, following the *Act of Settlement* 1701, and has been adopted by the constitutions of many former British colonies’.³¹

The power of discipline or removal of judges is vested in parliament in many countries including Australia, Canada, England, India, and the US. Under this system parliament acts as a mechanism to control the exclusive executive power of disciplining judges. It can protect judges from arbitrary removal by the executive

²⁵ *ibid.*

²⁶ Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) 99; Akkas (n 3) 206.

²⁷ Vince Morabito, ‘The Judicial Officers Act 1986 (NSW): A Dangerous Precedent or a Model to be followed?’, (1993) 16 *University of New South Wales Law Journal* 481, 490.

²⁸ Akkas (n 3) 206.

²⁹ *ibid.* 207; Shimon Shetreet, *Judges on Trial* (North-Holland Publishing Company, 1976) 121.

³⁰ Elliot Bulmer, *Judicial Tenure, Removal, Immunity and Accountability* (International Institute for Democracy and Electoral Assistance, 2nd ed, 2017) 11.

³¹ *ibid.* 10.

government.³² However, the parliamentary involvement in disciplining judges carries two inherent drawbacks as noted below.

First, in any parliamentary form of government, the government of the day holds a majority and thus, parliament is controlled by the executive government. Consequently, parliamentary involvement in the disciplinary mechanism is not free from the executive interference.³³

And secondly, it is beyond doubt that parliament is a political body and therefore, political passions play a crucial role in the parliamentary process of judicial discipline. It is quite possible that the entire process of parliamentary discipline may be guided by political considerations.³⁴

9.3.2 Involvement of Judiciary in Disciplining Judges

In disciplining judges, the judiciary may be involved in investigation or inquiry required for other disciplinary mechanisms. Moreover, other disciplinary mechanisms may require consultation or recommendation from the judiciary.³⁵

9.3.2.1 Judicial Involvement in Investigation or Inquiry

The power to discipline judges may be exercised by the executive or legislature based on a report of an investigation or inquiry conducted by the judiciary. In this regard, the disciplinary system of superior judges of India may be an important example. The judge of the Supreme Court or of a High Court of India may be removed by an order of the President of India upon address of the House of the People and the Council of States.³⁶ If the Speaker/Chairman of the House/Council admits the motion for removal, he/she constitutes a committee for the purpose of investigating the alleged grounds for removal of the judge. After investigating the charges against the judge, if the inquiry committee records a finding in its report that the judge is 'not guilty', then no further steps should be taken by Parliament. However, if the report contains a finding that the judge is 'guilty of any misbehaviour or suffers from any incapacity', the motion together with the report will be taken up for consideration by the Parliament. If the Parliament adopts the motion, then the 'misbehaviour or incapacity' of the judge should be 'deemed to have been proved and an address praying for the removal of the judge' should be presented to the President.³⁷

³² Akkas (n 3) 207.

³³ *ibid.*

³⁴ *ibid* 208; Shetreet (n 29) 405.

³⁵ Akkas (n 3) 210.

³⁶ *Constitution of India*, Arts 124(4) and 217 (1)(b).

³⁷ *Judges (Inquiry) Act 1968* ss 3, 6.

9.3.2.2 Judicial Involvement in Consultation or Recommendation

In the case of consultation, the power of disciplining judges is vested in the executive, but in exercising this power the executive may consult the senior judiciary. In such a case, the role of the judiciary is merely consultative, and the advice given by the judiciary during consultation may or may not be accepted by the executive.

In the case of recommendation, the power of disciplining judge is vested in the executive subject to the recommendation of the judiciary. The judiciary initiates the disciplinary proceedings and recommends measures against judges, and then the executive takes disciplinary actions based on the recommendation of the higher judiciary.³⁸ This system of discipline is in practice in India in disciplining subordinate court judges.

9.3.2.3 Involvement of Judicial Commission or Disciplinary Council or Tribunal

The system of disciplining judges by using the judicial commission, disciplinary council, disciplinary tribunal, or disciplinary body is a relatively modern practice and it is working in many countries. In 1960, a Commission on Judicial Performance was first introduced in California in the United States, but subsequently all other states have established some form of commission for disciplining judges.³⁹ Following the Californian model, a Judicial Commission has been established in New South Wales in Australia under the *Judicial Officers Act* 1986. In some countries, judicial discipline involves a hybrid ad-hoc tribunal mechanism that combines both the Chief Judge or a commission and the executive as who are jointly responsible to decide to initiate tribunal proceedings. This system is in practice in Bahamas, Barbados, Botswana, Fiji, Jamaica, Ghana, Guyana, Kenya, Lesotho, Malaysia, Mauritius, Papua New Guinea, the Organisation of Eastern Caribbean States, Seychelles, Singapore, Solomon Islands, Tanzania, Trinidad and Tobago, Uganda and Zambia.⁴⁰

The effectiveness of such a commission or council or disciplinary body depends on its composition, powers, and functions. If a disciplinary commission comprising members of the executive, legislature, judiciary, legal profession, and lay persons uses an open and transparent process, it might be effective to retain public confidence in the disciplinary system. In this context, the Californian Commission on Judicial Performance, which is composed of three judges, two lawyers and six citizens, may

³⁸ Shimon Shetreet, 'Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends', (1986) 11 *International Legal Practitioner* 38, 40; Akkas (n 3) 211.

³⁹ Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995) 123.

⁴⁰ Jan Van Zyl Smit, *The appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (British Institute of International and Comparative Law 2015) 91.

be considered as an acceptable model.⁴¹ The most important features of the Californian Commission are that its formal proceedings are fairly open to public scrutiny and the Commission itself is empowered to impose disciplinary sanctions. Consequently, judicial discipline is probably free from executive control or political pressure. Another important feature is that the Californian Commission is not presided over by the Chief Justice, who is not even a member of the Commission. This feature is perhaps useful to reduce the influence of the superior judiciary in disciplining its members.⁴²

9.4 Mechanisms for Disciplining Judges in Bangladesh

For convenience, the mechanisms for discipline of judges in Bangladesh are discussed under two subheadings—

- (a) discipline of Supreme Court judges; and
- (b) discipline of subordinate court judges.

9.4.1 Discipline of Supreme Court Judges

In 1972, the Constitution of Bangladesh originally provided a parliamentary procedure for removal of the Supreme Court judges. Under the original article 96 of the Constitution a judge could be removed from his or her office by an order of the President following a resolution of Parliament on the ground of ‘proved misbehaviour or incapacity’. The resolution for removal was to be supported by a majority of at least two-thirds of the total number of members of Parliament. Parliament was empowered to make legal provision regulating the procedure for adopting a resolution and for the ‘investigation and proof of the misbehaviour or incapacity’ of the judge.

The original article 96 was effective until 1975, when the *Constitution (Fourth Amendment) Act 1975* was passed, but no law was made by Parliament to regulate the procedure for removal of judges. Under section 15 of the *Constitution (Fourth Amendment) Act 1975*, article 96 of Constitution was drastically changed providing that a judge could be removed from his/her office by an order of the President. However, no judge would be removed without being given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him/her. This system was repealed by the *Second Proclamation (Seventh Amendment) Order 1976*⁴³ which re-introduced parliamentary process of removal as it was provided by the original

⁴¹ *Constitution of California*, Art 6, s 8.

⁴² Akkas (n 3) 218.

⁴³ *Second Proclamation Order No IV of 1976*, 28 May 1976.

Constitution; but it was again repealed by the *Proclamation (Amendment) Order 1977*⁴⁴ and a new system of removal of judges by a Supreme Judicial Council (SJC) was introduced. The *Second Proclamation (Tenth Amendment) Order 1977* changed the structure of the Supreme Court, but the process of removal of judges was unaffected. The system of removal of judges by a SJC still exists in article 96 of the Constitution. The SJC consists of the Chief Justice and the two next most senior judges. If there is any allegation against a Member of the SJC or a Member of the SJC is absent or unable to act, the judge who is next in seniority would act as such Member.⁴⁵

When the President, on any information received from the SJC or from any other source, apprehends that a judge ‘may have ceased to be capable of properly performing the functions’ of his/her office by ‘reason of physical or mental incapacity’, or ‘may have been guilty of gross misconduct’, then the President may direct the SJC to ‘inquire into the matter and report its finding’.⁴⁶ After making the inquiry, if the SJC submits its reports with a finding that the judge ‘has ceased to be capable of properly performing the functions’ of his/her office or ‘has been guilty of gross misconduct’, the President by his/her order removes the judge from office.⁴⁷ In exercising this power of removal the President, under article 48(3) of the Constitution, must act on the advice of the Prime Minister. It is evident that the important power of adjudication of the disciplinary proceedings is vested in the SJC, which is exclusively composed of the members of the most senior judges of the Supreme Court.

The system of disciplining the Supreme Court judges through the SJC was replaced with the parliamentary system by the *Constitution (Sixteenth Amendment) Act 2014*, which in fact re-introduced the provision of original article 96 (2–3), and thus, it was enacted that a judge must not be removed from his/her office ‘except by an order of the President passed pursuant to a resolution of Parliament supported by a majority of not less than two-thirds of the total number of members of Parliament, on the ground of proved misbehaviour or incapacity’. It was also enacted that the ‘Parliament may by law regulate the procedure’ in relation to a said resolution and for ‘investigation and proof of the misbehaviour or incapacity of a judge’.

However, the *Constitution (Sixteenth Amendment) Act 2014* was challenged in the High Court Division of the Supreme Court (HCD) by nine advocates in *Asaduzzaman Siddiqui v Bangladesh* (Writ Petition No 89989/2014). The HCD by a split judgment (by a majority of 2:1) declares the *Constitution (Sixteenth Amendment) Act 2014* void, illegal and *ultra vires* of the Constitution. Then, an appeal was filed by the government in the Appellate Division of the Supreme Court (AD) against the judgment of the HCD. The AD upholds the judgment of the HCD and declares the *Constitution (Sixteenth Amendment) Act 2014 ultra vires* of the Constitution. Thus, mechanism for disciplining the Supreme Court judges involving the SJC has been restored.⁴⁸

⁴⁴ *Proclamations Order* No I of 1977, 23 April 1977.

⁴⁵ *Constitution of Bangladesh*, Art 96(3).

⁴⁶ *ibid*, art 96(5).

⁴⁷ *ibid*, art 96(6).

⁴⁸ *Bangladesh v Asaduzzaman Siddiqui* (2019) 71 DLR (AD) 52, 200.

A close look at the mechanism for discipline through the SJC reveals that there are three significant drawbacks in it. The *first drawback* is that the President may initiate the disciplinary proceedings by directing the SJC to inquire into the capacity or conduct of a judge, but the President is bound to act on the advice of the Prime Minister. Hence the initiation of disciplinary proceedings against a Supreme Court judge depends on the executive and therefore, the political will of the executive may be very crucial to disciplining judges. Under the current system of judicial appointment, the executive may appoint the Supreme Court judges from among persons who are involved in politics or active supporters of the party in power or at least sympathetic to its ideologies and policies. Consequently, the power of initiating disciplinary proceedings may be misused by the executive. It is likely that the executive may intend to save a transgressing judge from disciplinary action because of personal or political favouritism or nepotism.⁴⁹

The *second drawback* is that there is no specific system for making complaints against a judge. The process of making complaints against a judge is not easily accessible and it might be called inappropriate.⁵⁰ The President may receive information about the incapacity or misconduct of a judge from the SJC or from 'any other source'. From the expression 'any other source' it is not clear what sources may be acceptable or may have access to the President to make a complaint against a judge. In the absence of any specific system of making complaint, it may not be possible for an ordinary citizen to inform the President about the incapacity or misconduct of a judge. The main potential source of information about the incapacity or misconduct of a judge is the SJC, but it is exclusively composed of judges. Therefore, it is likely that in some cases the SJC would hesitate to make a complaint against a fellow judge. In this way, a transgressing judge might escape disciplinary proceedings. It is very likely that the SJC will not act first but will rely on other sources to complain to the President. It is alleged that there are some instances of breach of judicial conduct in which the SJC did not make any complaint to the President to initiate disciplinary proceedings.⁵¹

The *third drawback* is that the SJC enjoys ample power to discipline but its composition is not compatible with the concept of judicial accountability. There is no participation of the legal profession or lay persons. In addition, the disciplinary procedure is largely controlled by the judiciary itself. The executive government participates in the proceedings, but the role of the SJC is predominant in disciplining judges.⁵² This mechanism is probably less effective in ensuring the accountability of judges and it might fail to gain public confidence in the disciplinary system.⁵³

⁴⁹ Akkas (n 3) 230–231.

⁵⁰ *ibid* 232.

⁵¹ *ibid* 233.

⁵² *ibid* 234.

⁵³ *ibid* 235.

9.4.2 *Discipline of Subordinate Court Judges*

Under the original article 116 of the Constitution 1972, the power of disciplining the subordinate court judges was exclusively vested in the Supreme Court. This power of the Supreme Court was curtailed by the *Constitution (Fourth Amendment) Act 1975*, which replaced the ‘Supreme Court’ by the ‘President’ as the sole authority to discipline the subordinate court judges.⁵⁴ Thereafter, by the *Second Proclamation (Fifteenth Amendment) Order 1978*, article 116 of the Constitution was again amended by adding that the power of the President in disciplining judges should be exercised in consultation with the Supreme Court.⁵⁵ This provision is also retained by the *Constitution (Fifteenth Amendment) Act 2011*, and therefore in exercising the power of discipline the President is under a constitutional obligation to consult the Supreme Court.

Under the current parliamentary form of government, since the President is bound to act on the advice of the Prime Minister, the real power of disciplining the subordinate court judges is vested in the Prime Minister. However, the provision for consultation with Supreme Court is a check on the absolute power of the political executive in disciplining judges. In *Secretary, Ministry of Finance v Hossain* (2000), the AD held that the ‘views and opinion’ of the Supreme Court given under article 116 of the Constitution should have ‘primacy over the views and opinions of the executive’.⁵⁶ Thus, the views and opinions of the Supreme Court prevail over those of the executive in disciplining subordinate court judges. This primacy has been incorporated in rule 29(2) of the *Bangladesh Judicial Service (Discipline) Rules 2017 (BJS Discipline Rules)*, which states that in case of the difference of the proposal of the appropriate authority and the opinion of the Supreme Court, the opinion of the Supreme Court prevails. The expression ‘appropriate authority’ as defined in rule 2(h) of the *BJS Discipline Rules* means the President or the Ministry or Division/Department invested with the responsibility of the administration of the Bangladesh Judicial Service under the Rules of Business made by the President in accordance with article 55(6) of the Constitution. In fact, the Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs, acts as the ‘appropriate authority’.

The detailed procedure for disciplining the subordinate court judges is prescribed by the *BJS Discipline Rules*. In the case of any specific allegation of inefficiency other than physical or mental incapacity, misconduct, corrupt practices or involvement in corruption, activities subversive to the state, desertion or criminal offence against a subordinate court judge, the proper authority first gives the judge an opportunity to explain the matter of allegation. If the allegation *prima facie* appears to be reasonable to the appropriate authority, then after receiving the explanation from the accused judge, the matter is sent to the Supreme Court for

⁵⁴ *Constitution (Fourth Amendment) Act 1975*, s 20.

⁵⁵ *Second Proclamation (Fifteenth Amendment) Order 1978*, s 2(4)(iv).

⁵⁶ *Secretary, Ministry of Finance v Masdar Hossain* (2000) DLR (AD) 82, 102, 109.

consultation. If after considering the explanation submitted by the accused judge the appropriate authority is of opinion that the matter requires formal inquiry, it in consultation with the Supreme Court appoints an Inquiry Officer or constitutes a committee with more than one officers.⁵⁷ In appointing the inquiry officer it is to be noticed that:

- (a) if the accused judge is a Joint District Judge or a judge below this rank, the Inquiry Officer should be appointed from among the judicial officers serving in the rank of at least Additional District Judge; and
- (b) if the accused judge is a District Judge or Additional District Judge, the Inquiry Officer should be appointed from among the judicial officers serving in the rank of District Judge; and
- (c) the Inquiry Officer should be senior to the accused judge in keeping with the latest gradation list. However, in case of unavailability senior judicial officer, any judicial officer serving in the rank of District Judge may be appointed as the Inquiry Officer.⁵⁸

After scrutinising the allegation, written explanation (if any) of the accused judge, and evidence, information and incidental matters obtained in the inquiry the Inquiry Officer submits his or her report along with all information obtained to the appropriate authority within a period not exceeding 30 days. It is to be specifically mentioned in the inquiry report that whether the allegation is *prima facie* true or not; or whether further inquiry is required or not. On receipt of the report the appropriate authority sends it within next 7 days to the Supreme Court for consultation.⁵⁹

If the appropriate authority is satisfied that the allegation is *prima facie* proved and penalty under r 16 *BJS Discipline Rules* may be imposed upon the accused judge, then it may after consulting the Supreme Court take necessary measure to (a) adjudicate the matter or (b) further inquiry or (c) take any other step, such as caution, or the transfer of the concerned judge. If the Supreme Court gives opinion of additional inquiry, then proper authority directs the previous Inquiry Officer or committee, or new Inquiry Officer or committee to conduct additional inquiry and to submit report within 15 days.⁶⁰

When the opinion of initiating departmental proceeding against the accused judge is received from the Supreme Court, the appropriate authority initiates such proceeding and frames a charge stating the allegations and penalty likely to be imposed and communicates it to the judge along with the first show cause notice asking him or her to a written statement within 30 days.⁶¹ If after considering the written statement submitted by the accused judge as well as the statement given in his or her personal hearing (when the accused judge so desires) the appropriate

⁵⁷ *BJS Discipline Rules* 2017, r 3(2–4).

⁵⁸ *ibid*, r 5.

⁵⁹ *ibid*, r 4(5, 6).

⁶⁰ *ibid*, r 4(7–8).

⁶¹ *ibid*, rr 6, 8.

authority is satisfied that there is any reason to proceed further, then after consulting the Supreme Court, it takes step to initiate investigation. For the purpose of investigation, the appropriate authority in consultation with the Supreme Court appoints a judicial officer as investigation officer or constitutes a committee consisting of three judicial officers. The investigation officer or the chairperson or members of the investigation committee must be senior to the accused judge, and in case of unavailability of senior officer(s), person officer(s) of equal rank may be appointed. During the investigation the accused judge is entitled to cross-examine the witnesses against him/her and to give evidence for the defence.⁶²

On receipt of the investigation report with findings, the proper authority considers the report and decides on the charge against the judge in consultation with the Supreme Court. If the Supreme Court gives opinion of imposing a major penalty, the second show cause notice is served upon the accused judge asking him/her to submit a written statement within 15 days. After receiving the written statement, the proper authority consults the Supreme Court and if the Supreme Court gives opinion of imposing a major penalty, then proper authority submits the matter to the appointing authority, *ie*, the President of Bangladesh for approval. After receiving approval from the President, the proper authority issues the final order.⁶³ A subordinate court judge may apply to the appropriate authority for review of the decision of the disciplinary proceeding against him or her, except in the case of a punishment of censure in which case he or she may prefer an appeal to the President and the decision of the President is final.⁶⁴

It appears that the system of discipline of the subordinate court judges in Bangladesh has an inherent defect. There is no specific system for making complaints against a judge and the process is not open to the public. Actually, the entire system of judicial discipline based on the internal administrative control of the judiciary. The Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs serves as the 'appropriate authority' and directly controls the subordinate court judges in consultation with the Supreme Court, but it is not easy for the public to make a complaint against a judge to the Ministry. This is because the general public does not have easy access to the Ministry, and there is a fear of contempt of court because of the absence of a specific system of making complaints. As a matter of fact, there is no specific system to receive any complaints directly from the public.

9.5 Conclusion

The mechanisms for judicial accountability, particularly the disciplinary system of Bangladesh is not sufficient to gain public confidence for several reasons, two of them are very significant.

⁶² *ibid*, rr, 10(3), 18, 19.

⁶³ *ibid*, r 22.

⁶⁴ *ibid*, r 27.

First, there is no specific system or procedure for making complaints against a transgressing judge. Consequently, it is almost impossible for the general public to file a complaint against a judge for incapacity or misconduct, particularly for corruption. For the sake of public confidence in the judiciary, particularly to ensure justice free from illegality and corruption and maintain high standards of conduct and propriety of judges, there should be an accessible system to make complaints against judges. However, to save the judges from baseless allegations, a system of preliminary examination of the complaints should be introduced. The system of preliminary enquiry of public complaints is working well in the models of commission of California and New South Wales in Australia.⁶⁵

And secondly, the SJC in Bangladesh, which is exclusively composed of the three senior judges, is the most powerful mechanism for disciplining Supreme Court judges.⁶⁶ There is no participation of members of the executive, legislature, legal profession, or laypersons. In respect of the discipline of subordinate courts judges, the executive government enjoys absolute power.⁶⁷ In order to strengthen the confidence of the people, a robust and balanced disciplinary system for judges, higher and lower alike, needs to be formulated and implemented. In so doing, the policy of 'exclusivity' needs to be reformed by 'inclusivity' to ensure the participation of possible stakeholders. The introduction of a complaint procedure is likely to go a long way in affording easy access for the aggrieved, particularly laypersons, to the process of disciplining judges.

References

Books

- Akkas, S.A. 2004. *Independence and Accountability of Judiciary: A Critical Review*. Dhaka: Center for Rights and Governance.
- Bowring, J. 1843. *The Works of Jeremy Bentham*. Edinburgh: William Tait, Constitutional Code, Book II, ch XII, sec XIV, vol X.
- Bulmer, E. 2017. *Judicial Tenure, Removal, Immunity and Accountability*. 2nd ed. International Institute for Democracy and Electoral Assistance.
- Butler, D., and S. Rodrick. 1999. *Australian Media Law*. Pyrmont: LBC Information Services.
- Campbell, E., and H.P. Lee. 2001. *The Australian Judiciary*. Cambridge: Cambridge University Press.
- Cappelletti, M. 1989. *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press.
- Friedland, M.L. 1995. *A Place Apart: Judicial Independence and Accountability in Canada*. Ottawa: Canadian Judicial Council.
- Shetreet, S. 1976. *Judges on Trial*. Amsterdam: North-Holland Publishing Company.

⁶⁵ Akkas (n 3) 241.

⁶⁶ *ibid*.

⁶⁷ *Ibid* 242.

Smit, J.V.Z. 2015. *The appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice*. London: British Institute of International and Comparative Law.

Chapters in Edited Books

Dhavan, R. 1985. Judges and Accountability. In *Judges and the Judicial Power*, ed. R. Dhavan et al., 167. Sweet & Maxwell.

Doyle, John. 1997. The Well-Tuned Cymbal. In *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, ed. Helen Cunningham, 42. Judicial Commission of New South Wales.

Articles

Gleeson, M. 1979. Judging the Judges. *Australian Law Journal* 53: 338.

Gleeson M. 1994. Judicial Accountability. In *Courts in a Representative Democracy: A Collection of the Papers from a National Conference in Canberra* (The Australian Institute of Judicial Administration).

Handsley, E. 2001. Issues Paper on Judicial Accountability. *Journal of Judicial Administration* 10: 181.

Mason A. 1993. *Justice at the Appellate Level* (A paper presented at the 10th South Pacific Judicial Conference, Vanuca Island, Fiji, 28 May 1993).

Morabito, V. 1993. The Judicial Officers Act 1986 (NSW): A Dangerous Precedent or a Model to be followed? *University of New South Wales Law Journal* 16: 481.

Nicholson, R.D. 1993. Judicial Independence and Accountability: Can They Co-exist? *Australian Law Journal* 67: 404.

Shetreet, S. 1986. Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends. *International Legal Practitioner* 11: 38.

Document

International Commission of Jurists. 2016. *Judicial accountability—a practitioners' guide* (Geneva).

Internet Source

Consultative Council of European Judges. 2015. *Position of the Judiciary and Its Relation with the Other Powers of State in a Modern Democracy* (2015) 4 CCJE [21]. <https://rm.coe.int/16807481a1>. Accessed 28 April 2022.

Sarkar Ali Akkas Sarkar Ali Akkas is a Professor of Law at Jagannath university, Dhaka. He obtained LLB (Hons) and LLM from the University of Rajshahi (Bangladesh) and PhD from University of Wollongong (Australia). His research interests include constitutional law, judiciary, and judicial administration. Professor Akkas has authored six books, 22 articles in reputed law journals, and several law book reviews and conference presentations. His opinion has been cited by the Supreme Court of Bangladesh in the Sixteenth Amendment Case 2017 from his book *Independence and Accountability of Judiciary: A Critical Review* and the Supreme Court of India in the Supreme Court Advocates-on-Record Association vs Union of India 2015 from his article in the *Bond Law Review* (Australia).

Chapter 10

Fifty Years of Electioneering in Bangladesh: The Collapse of a Constitutional Design



M Jashim Ali Chowdhury

Abstract The orderly transfer of power through regular, participatory, free, fair, and credible election is the most fundamental, though not the only, requirement of democratic constitutionalism. Bangladesh's 50 years-long electioneering experience represents a constitutional design spoiled by a culturally illiberal value system. This chapter argues that the problems of elections in Bangladesh are twofold. First, Bangladesh's formal institutional design of electioneering is undermined by its purposeful abuse at the hands of its personalised, clientelist and competitively illiberal 'Eastminster' political system. The power-perpetuating tendency of the system prefers elections that could prevent the people from choosing their representatives – elections of 'Preventive Representation'. Secondly, the reform initiatives undertaken at different stages of Bangladesh's political history show a visible lack of 'Democratic-instrumental Vision', which would ask for institutional imagination on the reformers' part. Bangladesh's 'independent' Election Commission has been successfully co-opted. Later, an unusual structure of caretaker government was established, tempered and lastly, done away with as a matter of elite preference devoid of public participation.

Keywords Election system · Election commission · Democratic vision · Participatory elections · Illiberal values · 'Eastminster' system · Preventive representation · Reforms

10.1 Introduction

The election is the foremost validator of democracy. Periodic elections legitimise the formation and change of governments and enforce the representatives' political accountability to the people. However, Bangladesh's 50 years' experiences with

M. J. A. Chowdhury (✉)
School of Law, University of Hull, Hull, UK
e-mail: jashim.chy@gmail.com

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*,
https://doi.org/10.1007/978-981-99-2579-7_10

electioneering present a despairing picture of manipulating electoral institutions and suppressing the rulers' political accountability. Commentators have consistently questioned the system and labelled it a tool of 'legitimation'¹ and 'preventive representation'.²

After Bangladesh's independence, a dominant party regime (1972–1975) and the subsequent military regimes (1975–1990) laid the country's constitutional design of electioneering bare. By 1990, the country's 'Independent' Election Commission became utterly exposed to political co-optation, and its inability to work unimpeded by the partisan governments and politicised bureaucracy was apparent.³ In 1990, the political parties struggling for the end of the military rule proposed an election-time non-party government headed by a judge of the Supreme Court. It was tested in the 1991 general election, and the result appeared promising.⁴ Later, the system was constitutionalised in 1996.⁵ Several subsequent rounds of parliamentary elections held under the non-party caretaker governments (1996–2001) appeared relatively free, fair and acceptable.⁶ However, by 2006, Bangladesh's political parties manipulated the caretaker government as well.⁷ Two controversial caretaker governments of 2006–2008 were controversial. They caused constitutional chaos and seismic instability in the country's governance and judiciary.⁸ The caretaker government system was scrapped, equally controversially, in 2011.⁹ It marked the completion of a constitutional experiment of the caretaker government that unmasked Bangladesh's illiberal and competitively authoritarian political parties, their questionable commitment to democracy, and their make-shift and short-term interest-driven approaches to constitutional reform.¹⁰

¹Ahmed Shafiqul Huque and Muhammad A Hakim, 'Elections in Bangladesh: Tools of Legitimation' (1993) 19(4) *Asian Affairs: An American Review* 248.

²M Moniruzzaman, 'Electoral Legitimacy, Preventive Representation, and Regularization of Authoritarian Democracy in Bangladesh' in Ryan Merlin Yonl (ed) *Elections: A Global Perspective* (Online: IntechOpen, 2019) 1–15.

³A Croissant, D Kuehn, P Lorenz and PW Chambers, 'Bangladesh: From Militarized Politics to Politicized Military' in *Democratization and Civilian Control in Asia* (Springer, London 2013) 118–35.

⁴Muhammad A Hakim, *Bangladesh Politics: The Shahabuddin Interregnum* (University Press Limited, Dhaka 1993) 38.

⁵Nizam Ahmed, *Non-party Caretaker Government in Bangladesh: Experience and Prospect* (University Press Limited, Dhaka 2004).

⁶Rashid A Moten, 'Parliamentary Elections in Bangladesh' (1981) 42(2) *The Indian Journal of Political Science* 58; M Moniruzzaman, 'Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament during 1991–2006' (2009) 47(1) *Commonwealth and Comparative Politics* 100.

⁷Ali Riaz, 'Bangladesh's Failed Election' (2014) 25(2) *Journal of Democracy* 119, 129.

⁸Kazi S M Khasrul Alam Quddusi, 'Criminalisation, Militarization and Democratic Restoration in Bangladesh' (2009) 13(4) *World Affairs: The Journal of International Issues* 136.

⁹Adeeba Aziz Khan, 'The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-political Caretaker Government' (2015) 3 *International Review of Law* 11.

¹⁰M Jashim Ali Chowdhury, 'Elections in 'Democratic' Bangladesh', in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 227–28.

This chapter addresses the root causes behind Bangladesh's electoral system breaking down. From a theoretical point of view, it argues that the existence and functioning of Bangladesh's farcical electoral system must be considered in light of the country's broader ecology of an 'Eastminster'¹¹ political system that promotes, rather say necessitates, the personalisation of political power. The personalisation of power, in their turn, necessitates its perpetuation by arm-twisting the electoral process into a system of 'Preventive Representation'.¹² Political actors in the 'Eastminster' also abhor any 'Democratic Instrumental Vision'¹³ towards electoral reform. The next part (part 2) of the chapter lays down its theoretical framework and briefly introduces the concepts of the 'Eastminster political system', 'Preventive Representation', and 'Democratic Instrumental Vision'. Part 3 provides a historically grounded analysis of Bangladesh's electoral system and shows how the power-perpetuation tendencies of the 'Eastminster' political system facilitated an electoral mechanism of 'Preventive Representation'. Part 4 explains how the personalising tendency of the system resists a 'Democratic Instrumental' approach to constitutional design and institution building. Finally, part 5 concludes by summarising the findings, pointing to the root of Bangladesh's electioneering problem.

10.2 Theoretical Framework

Democracy thrives both on the institutions and the values guiding their operational logic. This chapter rests on a theoretical proposition that the broader political ecology of Bangladesh's electoral institutions and processes is identifiable with what Kumarasingham calls the 'Eastminster Political systems' of the Southeast Asian region. Kumarasingham argues that the formal constitutional institutions in the 'Eastminster' remain conditioned by a cultural value system that promotes the personalisation of political powers.¹⁴ The political power structure in the 'Eastminster' is built upon a 'complex of personal relationships'¹⁵ that leads to an 'authoritarian framework of constitutionalism' where the rules of law are applied to a single person, dynasty or dominant party's favour and work towards the perpetuation of their powers.¹⁶ This personalising tendency brings two important consequences for the country's electoral system.

¹¹ Harshan Kumarasingham, 'Eastminster – Decolonisation and State- building in British Asia' in Harshan Kumarasingham (ed), *Constitution- making in Asia, Decolonisation and State-building in the aftermath of the British Empire* (Routledge, London 2016) 1–35.

¹² Maniruzzaman (n 2) 5–9.

¹³ Johan P Olsen, *Governing through Institution Building: Institutional Theory and Recent European Experiments in Democratic Organization* (OUP 2010).

¹⁴ Kumarasingham (n 11) 3–4.

¹⁵ *ibid.* 11

¹⁶ *ibid.* 26.

First, personalisation begets a perpetuation tendency in public power. The ‘Eastminster’'s personalised political parties endorse a crude version of majoritarianism that craves for elimination, rather than toleration, of political competition. While an institutionalised liberal-conservative bi-partisan competition is considered a vital requirement for parliamentary democracy,¹⁷ conditions supportive of such an environment are largely absent in the ‘Eastminster’. Therefore, the crude majoritarianism and illiberal bi-partisanship that operate in an ‘Eastminster’ are unprincipled, conspiracy-laden and antagonistic.¹⁸ Losing the power being a too costly bet to take, competing political parties in the ‘Eastminster’ prefer a system of ‘preventive representation’ where elections are engineered ‘to renew the legitimacy – and ascertain the longevity- of the ruling parties or regimes’ and at the same time, to prevent the opponents or peoples’ desired representatives from coming to power.¹⁹ Part 3 of this chapter will show how Bangladesh’s competitively authoritarian political parties have engineered an electoral system of ‘preventive representation’.

The second consequence is the deliberate suppression of what Olsen calls the ‘Democratic Instrumental Vision’ to constitutional design and institution building. The democratic instrumental vision requires a participatory citizen body and a system of governmental accountability to the peoples’ representatives. Therefore, political institutions owe their existence to a process of deliberative institution-building realised through public deliberation and informed choice. Olsen’s democratic-instrumental framework resembles Institutional Design literature that emphasises purposeful and institutional goal-oriented political intervention in democratic institutions.²⁰ Institutional designers are assumed to have a proper understanding – a democratic-instrumental vision – of institutional reforms, their purposes, sustainability, and impact.²¹ Even where the institutional designers in power do not have ‘clear, consistent, and stable goals’,²² the existence of democratic contestation for power and participatory influence of other public and societal institutions and interest groups ensures that long-term institutional goals are not abruptly ignored.

Olsen argues that it is the presence and absence of this ‘democratic instrumental vision’ that differentiates the ‘well-entrenched, stable polities’ from the ‘unsettled, emerging and transitory’²³ ones. In ‘Eastminster’'s personalised political system,

¹⁷ Peter Trubowitz and Nicole Mellow, “‘Going Bipartisan’: Politics by Other Means’ (2005) 120(3) *Political Science Quarterly* 433, 434.

¹⁸ M Jashim Ali Chowdhury ‘In Search of Parliamentary Opposition in Bangladesh’ IACL-AIDC Blog, 21 January 2021, <<https://blog-iacl-aidc.org/2021-posts/2021/1/21/in-search-of-parliamentary-opposition-in-bangladesh>> accessed 28 February 2022.

¹⁹ Maniruzzaman (n 2) 5.

²⁰ RE Goodin, *The Theory of Institutional Design* (Cambridge University Press, 1996).

²¹ Olsen (n 13) 6.

²² *ibid.* 13.

²³ *ibid.* 7.

‘informal rules of politics’,²⁴ for example, clientelism and patrimonialism,²⁵ personal charisma,²⁶ and privatisation of public interests,²⁷ often substitute the formal structures and processes.²⁸ Therefore, institutional designers in power do not prioritise the institutional goals over their self-serving and short-term political goals.²⁹ Absent a fair and free process of political competition and the participatory influence of other public and societal institutions and interests, the purposeful deinstitutionalisation of democratic institutions goes unhinged. Part 4 of this chapter will explain how the absence of an Olsenian ‘Democratic Instrumental Vision’ in Bangladesh’s ‘Eastminster’ system has contributed to the deinstitutionalising tendencies in electoral reforms.

10.3 Power Perpetuation and ‘Preventive Representation’ in Bangladesh

Bangladesh’s first parliamentary election was held on 7 March 1973. Though the father of the nation *Bangabandhu* Sheikh Mujibur Rahman’s party Awami League (AL) got a predictable majority, arguably, administrative irregularities and muscle power played a decisive role in several constituencies.³⁰ The Election Commission’s inability to effectively command the government administration got exposed in the very first election of the country.³¹ However, the rise of the military rulers after 1975 changed the landscape significantly.³² The Referendum of 1977, Presidential Election of 1978 and the Second Parliamentary Election of 1979³³ saw a constitutional

²⁴ Eric Wold, ‘Kinship, Friendship and Patron-Client Relations in Complex Societies’ in Eric Wolf (ed.), *Pathways of Power* (University of California Press 2001) 167.

²⁵ S Aminul Islam, ‘The Predicament of Democratic Consolidation in Bangladesh’ (2006) 3(2) *Bangladesh e-Journal of Sociology* 4.

²⁶ Goran Hyden, *African Politics in Comparative Perspective* (Cambridge University Press 2006) 94–116; Michael Bratton, ‘Formal Versus Informal Institutions in Africa’ (2007) 18 *Journal of Democracy* 97.

²⁷ Mushtaq Khan, ‘Markets, States and Democracy: Patron-Client Networks and the case for Democracy in Developing Countries’ (2005) 12(5) *Democratization* 704, 714.

²⁸ Hans Joachim Lauth, ‘Informal Institutions and Democracy’ (2000) 7 *Democratization* 21, 25.

²⁹ Steven Levitsky and Gretchn Helmke, ‘Informal Institutions and Comparative Politics: A Research Agenda’ (Working Paper 307, Kellogg Institute for International Studies, September 2003) 5.

³⁰ Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (University Press Limited, Dhaka 1983) 143–44.

³¹ Abul Fazl Huq, ‘Constitution-Making in Bangladesh’ (1973) 46(1) *Pacific Affairs* 59, 75.

³² Samina Ahmed, ‘Politics in Bangladesh: The Paradox of Military Intervention’ (1991) 9(1) *Regional Studies* 58.

³³ Craig Baxter and M. Rashiduzzaman, ‘Bangladesh Votes: 1978 and 1979’ (1981) 21(4) *Asian Survey* 485.

amendment to permit the military ruler's presidential bid³⁴ and large-scale state patronisation for the President's platform Bangladesh Nationalist Party (BNP).³⁵ The Constitution was amended once again in 1981 to legalise the BNP candidate Justice Abdus Sattar's presidential bid after Zia's assassination.³⁶

Within months, Army Chief HM Ershad overthrew Justice Sattar's government.³⁷ Later, Ershad arranged a Referendum on 21 March 1985. Despite the political parties boycotting the election, the Election Commission showed a 72.14 per cent voter turnout and a staggering 94.14 per cent votes for Ershad's presidency. Independent observers, including the international delegates, estimated the voter turnout at around 20 per cent.³⁸ The next of Ershad – The Third Parliamentary Election of 1986 – was marked by ballot stuffing, ballot-box looting, polling station capture and opposition harassment.³⁹ Despite all these, the initial returns showed a significant gain for the opposition AL. The Election Commission then stopped declaring the results, and the government-controlled television later announced Ershad's Jatyia Party (JP) winning the election.⁴⁰ The British election observer team labelled it 'a tragedy for democracy' and a 'cynically frustrated' process.⁴¹ Ershad arranged a Presidential Election in October 1986. Despite the opposition parties' boycott, Ershad officially secured 83.57 per cent of the 54.23 per cent votes cast. Like the 1985 Referendum, the independent election observers projected the turnout around 15 per cent.⁴² Ershad's next election was the Fourth Parliamentary Election of 1988.⁴³ Again boycotted by the opposition parties, Ershad coalesced a make-shift opposition called the Combined Opposition Party (COP), comprising 76 name-only

³⁴ *A.K Mujibur Rahman v. Returning Officer & ors* 31 DLR (1979) (HCD) 156.

³⁵ Syed Serajul Islam, 'The State in Bangladesh under Zia (1975–81)' (1984) 24(5) *Asian Survey* 556, 568–69.

³⁶ Justice Abdus Sattar, the then Vice President, became the Acting President after Zia's assassination and put forth his candidacy in the Presidential election. Since the Constitution did not permit a person holding an office of profit in the service of the Republic to contest the election, the Constitution (Sixth Amendment) Bill was passed to provide that the post of Vice President was not an office of profit (The Constitution (Sixth Amendment) Act, 1981, s 3).

³⁷ Syed Badrul Ahsan, 'Ershad, his coup and stories of military rule' *The Bdnews24.com*, Dhaka, 29 June 2017, <<https://opinion.bdnews24.com/2017/06/29/ershad-his-coup-and-stories-of-military-rule/>> accessed 5 January 2021.

³⁸ Peter J Bertocci, 'Bangladesh in 1985: Resolute Against the Storms' (1986) 26(2) *Asian Survey* 229.

³⁹ Staff Correspondence, 'Violence Mares Election in Bangladesh 1985' *The New York Times*, 5 August 1986, <<https://www.nytimes.com/1986/05/08/world/violence-mars-bangladesh-election.html>> accessed 5 January 2022.

⁴⁰ Stanley A Kuchnek, 'Corruption and Criminalization of Politics in South Asia' in Paul Brass (ed), *Routledge Handbook of South Asian Politics: India, Pakistan, Bangladesh, Sri Lanka and Nepal* (Routledge, London 2010) 377.

⁴¹ Hakim (n 4) 27.

⁴² Ahmed (n 32).

⁴³ Nizam Ahmed, 'Bangladesh' in D. Nohlen, F. Grotz and C. Hartmann (eds), *Elections in Asia: A Data Handbook* (OUP, 2001) 528.

political parties. The Election Commission showed a 54.93 per cent turnout this time, while the boycotting parties ridiculed it by claiming a 1% voter turnout.⁴⁴

By 1990, the opposition parties resolved not to participate in any election held under the Ershad government. Unable to withstand the pressure, Ershad handed over the power to Chief Justice Shahabuddin Ahmed in 1990. Justice Ahmed was appointed the Vice-President before Ershad's resignation and soon succeeded the presidency.⁴⁵ Justice Ahmed's interim government was called a 'caretaker government' and tasked with holding an election to the Fifth Parliament in 1991.⁴⁶ The election of 1991 is widely acclaimed as a free and fair one. Zia's widow Begum Khaleda Zia led the BNP and secured a majority.⁴⁷

However, at that stage of Bangladesh's political development, the survival of parliamentary democracy depended on other issues directly impinging upon the system.⁴⁸ At least two of those issues constituted unsurmountable hurdles for Bangladesh's post-1990 parliamentary system. First, by the 1990s, Bangladesh's party system got firmly dynastic and patriarchic roots. *Bangabandhu's* daughter Sheikh Hasina was now placed at the helm of AL. Zia's widow Begum Khaleda Zia got a similar hold over BNP. Deposed ruler Ershad continued to hold a firm grip over the JP. Consolidation of this personalistic leadership style would ravage the potential of intra-party democracy and an open, transparent, democratic, and merit-based political recruitment and promotion within the parties.⁴⁹ Secondly, Bangladesh's anti-liberation war political parties, including the *Jama'at e Islami* (JI), banned in independent Bangladesh, got revived during Zia's reign.⁵⁰ Revival of JI and its natural ease with Begum Zia's BNP would later emerge as an irreconcilable dispute between the pro-liberation and secularist AL and Pakistan leaning and religious nationalist BNP. Also, Major Zia's dubious role during the murder of *Bangabandhu* would feed a deep distrust between AL and BNP. Therefore, the post-upsurge of Bangladesh was thwarted by illiberal bipartisanship that emerged through the years of militarisation, radicalisation and polarisation of politics. Many consider the post-1990 political race for perpetual power directly resulting from this politics of distrust and mutual hostility.⁵¹

⁴⁴ Hakim (n 4) 30.

⁴⁵ Talukder Maniruzzaman, 'The Fall of the Military Dictator: 1991 Elections and the Prospect of Civilian Rule in Bangladesh' (1992) 65(2) *Pacific Affairs* 203, 203–206.

⁴⁶ Fakhruddin Ahmed, *The Caretakers: A Firsthand Account of the Interim Government of Bangladesh (1990–1991)* (University Press Limited, Dhaka 1998) 12–13.

⁴⁷ Zillur R Khan, 'Bangladesh's Experiments with Parliamentary Democracy' (1997) 37(6) *Asian Survey* 581.

⁴⁸ Craig Baxter, 'Bangladesh a Parliamentary Democracy, if They Can Keep It' (1992) 91(563) *Current History* 132.

⁴⁹ Samiul Hasan, 'Corruption, Accountability and Political Parties in Bangladesh: Connections and Consequences' in T May and B Ray (eds), *Democratic Ideals, Governance, and Corruption in South Asia* (Freedom Press, Kolkata 2006) 9–10.

⁵⁰ Robert S Anderson, 'Impressions of Bangladesh: The Rule of Arms and the Politics of Exhortation' (1976) 49(3) *Pacific Affairs* 443, 445.

⁵¹ Stanley A Kochanek, 'Governance, Patronage Politics, and Democratic Transition in Bangladesh' (2000) 40(3) *Asian Survey* 530, 531–33.

In 1994, the BNP government staged an infamous parliamentary by-election of vote-rigging and ballot stuffing.⁵² The opposition parties, including AL, JP and JJ, then demanded the constitutionalisation of Justice Ahmed style 'caretaker government' and pledged to boycott any other election held under the BNP government. BNP staged another one-party election – the Sixth Parliamentary Election – on 15 February 1996 and secured 92.7% of the total seats. Though Election Commission showed a 21 per cent voter turnout, independent estimates put the number around 5%.⁵³ Facing a severe legitimacy crisis, BNP gave in to the demand. The Thirteenth Amendment to the Constitution introduced an election-time caretaker system led by the most recently retired Chief Justice of Bangladesh in 1996.⁵⁴

The non-party caretaker government was supposed to aid and assist the Election Commission in conducting the parliamentary election. The caretaker system travelled an eventful journey towards its ultimate demise in 2011.⁵⁵ The Seventh (1996), Eighth (2001) and Ninth (2008) Parliamentary Elections are considered a relatively free, fair, and accurate reflection of public opinion.⁵⁶ The system, however, showed some serious internal contradictions and constitutional anomalies before it was judicially held unconstitutional and hence discarded in 2011.

The Tenth Parliamentary Election (5 January 2014) held under the AL government restaged another one-party election in Bangladesh. It saw most of the MPs elected uncontested before the actual election day.⁵⁷ An organisationally diminished BNP participated in the Eleventh Parliamentary Election of 30 December 2018. However, an electoral level playing field has been a far cry by then.⁵⁸ BNP supporters and activists were visibly marginalised by the politicised election commission, bureaucracy, and law enforcement agencies. Despite BNP's organisational weaknesses, it has been claimed that the AL activists captured most polling stations the night before the election day and stuffed the ballot boxes.⁵⁹

The system's institutional weaknesses have also been exposed in the local government elections. Like the past elections, the recent local government elections

⁵² Golam Hossain, 'Bangladesh in 1994: Democracy at Risk' (1995) 35(2) *Asian Survey* 172.

⁵³ M Rashiduzzaman, 'Political Unrest and Democracy in Bangladesh' (1997) 37(3) *Asian Survey* 260.

⁵⁴ Nizam Ahmed, 'From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973–2001)' (2003) 76(1) *Pacific Affairs* 55, 59.

⁵⁵ Nizam Ahmed, 'Non-Party Caretaker Governments and Parliamentary Elections in Bangladesh: Panacea or Pandora's Box?' (2004) 11(1) *South Asian Survey* 49.

⁵⁶ Fakhruddin Ahmed (n 46); Zillur R Khan, 'Bangladesh's Experiments with Parliamentary Democracy' (1997) 37(6) *Asian Survey* 581.

⁵⁷ Ali Riaz, 'Shifting Tides in South Asia: Bangladesh's Failed Election' (2014) 25(2) *Journal of Democracy* 119; Shelley Feldman, 'Bangladesh in 2014: Illusive Democracy' (2015) 55(1) *Asian Survey* 67; Md Joynal Abedin, 'Legitimacy Crisis in Bangladesh: A Case Study of 10th General Election' (2020) 392) *European Journal of Political Science Studies* 1.

⁵⁸ Ali Riaz, 'Bangladesh: From an Electoral Democracy to a Hybrid Regime (1991–2018)' in Ali Riaz (ed), *Voting in a Hybrid Regime Explaining the 2018 Bangladeshi Election, Politics of South Asia* (Palgrave Pivot, Singapore 2019) 21–31.

⁵⁹ Moniruzzaman (n 2).

at Union Parishad, Upazilla, Municipal and City Corporation level are marked by local feuds, intimidation, murder, polling station capture, ballot box looting, and ballot stuffing.⁶⁰ While there have been occasional success stories of relatively peaceful local government elections, the introduction of partisan competition has fueled intra-party factionalism and encouraged the Election Commission to adopt a hands-off policy to the allegations of electoral violence and maladministration.⁶¹

The controversial elections to the Tenth and Eleventh parliaments and the subsequent local government elections held under a partisan government have put Bangladesh's election system in a discredited position. Some argue that these elections have essentially brought the martial law era of 'election engineering'⁶² back into life. In 1980s, 'Election engineering' was used as a famous coinage to describe the administrative, financial, and political manipulation of the Election Commission, field-level election officers, law enforcement agencies and bureaucracy in favour of the ruling parties. Under this electoral management technique, the opponents stand systematically prevented from winning the election long before the election is held. This preventive approach to political representation agonisingly drives the political opponents and the people from electoral participation. The widespread public withdrawal from the electoral process in recent elections has been interpreted as optimising the country's electoral system's credibility crisis.⁶³

10.4 'Democratic Instrumental Vision' and Deinstitutionalised Electoral Reforms

As mentioned before, 'Eastminster's' power-personalisation tendency has direct consequences upon democratic consolidation and institutionalisation. The actions of Bangladesh's competing political parties, particularly their patriarchic leaders, since the independence suggest that they never gave up their desire for a perpetual grasp on power and total elimination of their opponents.⁶⁴ It encouraged the suppression of what Olsen calls a 'Democratic Instrumental Vision' in institutional reform. Ruling parties and the agents charged with reforming the system changed the rules and institutions in ways that best served their power-retaining purposes,

⁶⁰Nasir Uddin, 'Recent Trends of Local Government Elections in Bangladesh: An Analysis on Profile and Politics' (2016) 4(2) *Public Affairs and Governance* 166, 176.

⁶¹Abu Elias Sarker and Faraha Nawaz, 'Clientelism, Partyarchy and Democratic Backsliding: A Case Study of Local Government Elections in Bangladesh' (2019) 26(1) *South Asian Survey* 70.

⁶²Maniruzzaman (n 2) 5.

⁶³Zyma Islam and Partha Pratim Bhattacharjee, 'Dhaka City Polls: Turnout under 20pc in one third of centres' *The Daily Star*, Dhaka, 6 February 2020, <<https://www.thedailystar.net/frontpage/dhaka-city-elections-2020-vote-turnout-less-20-percent-1864021>> accessed 28 February 2022.

⁶⁴Abul Kalam Azad and Charles Crothers, 'Bangladesh: An Umpired Democracy' (2012) 3(6) *Journal of Social and Development Sciences* 203.

not the delicate institutional balance contemplated in the Constitution of 1972.⁶⁵ How the two important institutions of electioneering – the Election Commission and the Caretaker Government – have been deinstitutionalised by various short-sighted, selfish, and oven-ready reform formulas are explained below.

10.4.1 Purposeful Deinstitutionalisation of the Election Commission

Despite the Constitution's remarkable attention to the functional independence of the Election Commission,⁶⁶ the biggest threat to its institutional independence was lurking within the government's unrestricted appointment power.⁶⁷ The posts of the Chief Election Commissioner (CEC) and other Election Commissioners are filled by the President as per the advice of the Prime Minister.⁶⁸ Successive political governments had captured the Commission by using its appointment power. Though there had been a recent practice of convening a Search Committee for finding and recommending suitable Chief Election Commissioner and other Commissioners,⁶⁹ the process proved broadly farcical.⁷⁰ Constituted on an *ad hoc* basis and by the current Prime Minister's volition,⁷¹ the Search Committee had no legal footing to stand on.⁷²

The Chief Election Commissioner and other Election Commissioners Appointment Act, 2022⁷³ was recently passed after the ruling party's initial

⁶⁵Ridwanul Hoque, 'The Politics of Unconstitutional Amendments in Bangladesh' in Rehan Aberyatne and Ngoc Son Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge, London 2021) 210–28.

⁶⁶The Constitution of the Peoples' Republic of Bangladesh 1972, art 118 <<http://bdlaws.minlaw.gov.bd/act-367.html>> accessed 7 January 2022.

⁶⁷Sakhawat Hussain, *Electoral Reform in Bangladesh 1972–2008* (Palok Publishers, Dhaka 2012) 51.

⁶⁸Constitution (n 66) art 118 (1).

⁶⁹M Jashim Ali Chowdhury, 'The EC Search Committee: Towards a "consensual" constitutional convention?' *The Daily Star*, Dhaka, 7 February 2017, <<https://www.thedailystar.net/law-our-rights/towards-consensual-constitutional-convention-1356955>> accessed 28 February 2022.

⁷⁰Nure Alam Durjoy, 'Akbar Ali Khan: Search committee was not successful' *The Dhaka Tribune*, Dhaka, 11 February 2013, <<https://archive.dhakatribune.com/bangladesh/politics/2017/02/11/akbar-ali-khan-search-committee-not-successful>> accessed 7 January 2022.

⁷¹Hussain (n 67) 63.

⁷²Ashutosh Sarkar and Mohiuddin Alamgir, 'Law for EC Appointments: It's needed more than ever now' *The Daily Star*, Dhaka, 26 September 2021, <<https://www.thedailystar.net/news/bangladesh/news/law-ec-appointments-its-needed-more-ever-now-2184116>> accessed 28 February 2022.

⁷³The Chief Election Commissioner and other Election Commissioners Appointment Act, 2022 (Act No 1 of 2022) <<http://bdlaws.minlaw.gov.bd/act-details-1397.html>> accessed 28 February 2022.

reluctance to pass it.⁷⁴ The Act mandates the formation of a Search Committee to search and nominate ten names against the five Election Commissioners to be appointed.⁷⁵ A Judge of the Appellate Division heads the Search Committee. It comprises five other members, including one High Court Division Judge, the Comptroller and Auditor General, Chair of the Public Service Commission and two eminent citizens, including a woman.⁷⁶ The Committee may consult the political parties and civil society representatives and invite the names of potential Election Commissioners from them.⁷⁷ There are, however, concerns about the openness and transparency of the Committee's deliberation and decisions. Though the 2022 Act requires the Committee to work in a 'transparent and neutral way',⁷⁸ there are substantial doubts about its capability to ensure transparency.⁷⁹ Despite the demand from various quarters for publishing its list of nominees submitted to the President, the 2022 Search Committee decided not to publish it. It instead published a list of 329 nominees proposed by various political parties and civil society members.⁸⁰ Most importantly, the constitutional obligation of the President to take and act upon the advice of the Prime Minister remains intact. The 2022 Act does not say anything about the binding force of the Committee's recommendations.

Once constituted, the Commission needs to depend on the government bureaucracy, including the law enforcement agencies.⁸¹ Understandably, Bangladesh's politicised bureaucracy stands a 'formidable obstacle'⁸² to transparency, the rule of law and accountable governance. The Constitution requires the President to staff the Commission as per its requirements.⁸³ However, the 'requirement of the Commission' does not indicate its strength. The Commission usually places some numbers, for example, the returning officers, polling officers, support staff etc., before the President. The Constitution is silent about a separate Election Commission secretariat

⁷⁴ Partha Pratim Bhattacharjee and Mohiuddin Alamgir, 'EC Formation: Chance of a law slim' *The Daily Star*, Dhaka, 23 December 2021, <<https://www.thedailystar.net/news/bangladesh/politics/news/ec-formation-chance-law-slim-2923456>> accessed 7 January 2022.

⁷⁵ Appointment Act (n 73) ss 5, 6.

⁷⁶ *ibid.* s 3.

⁷⁷ *ibid.* s 4.

⁷⁸ *ibid.* s 4(1).

⁷⁹ Badiul Alam Majumder, 'Search Committee for EC: Transparency can counter confidence crisis' *The Daily Star*, Dhaka, 23 February 2022, <<https://www.thedailystar.net/views/opinion/news/search-committee-ec-transparency-can-counter-confidence-crisis-2968191>> accessed 28 February 2022.

⁸⁰ Staff Correspondent, 'With 322 names proposed for Election Commission, search committee is set to make final choices' *Bdnews24.com*, Dhaka, 15 February 2022, <<https://bdnews24.com/bangladesh/2022/02/15/with-322-names-proposed-for-election-commission-search-committee-is-set-to-make-final-choices>> accessed 28 February 2022.

⁸¹ Hussain (n 67).

⁸² Quamrul Alam and Julian Teicher, 'The State of Governance in Bangladesh: The Capture of State Institutions' (2012) 35(4) *South Asia: The Journal of South Asian Studies* 858.

⁸³ Constitution (n 66) art 120.

and requires the executive branch (the bureaucracy) to ‘assist’⁸⁴ the Commission. In 1984, Ershad brought the secretariat under the direct supervision of the President’s office. After the 1990 democratic revival, it continued to be attached with the Prime Minister’s office. The Commission’s principal officer – the Secretary – was appointed on deputation from the Prime Minister’s office. Thus, the Election Commissioners led an organisation they could not command. Later, in 2008 following a judicial order,⁸⁵ an Ordinance was issued separating the Commission Secretariat from the Prime Minister’s office. It was made into law in 2009.⁸⁶ The 2009 Act provided that the Commission secretariat would not be under the administrative control or supervision of any ministry, department, or division of the government, and the overall control of the secretariat would remain with the Chief Election Commissioner.⁸⁷ This provision, however, has been respected in breach. The Election Commission secretaries and subordinate staff sent on deputation from other Ministries and departments are practically not expected to perform their responsibilities in ways that might draw the ire of their political bosses in the government.⁸⁸

As Muzaffar and Schedler argue, an efficient election administration requires balancing ‘three conflicting imperatives’ – administrative efficiency, political neutrality, and public accountability of the bureaucracy.⁸⁹ In Bangladesh, the political parties rarely talk about civil service reform, the Public Service Commission (PSC)’s independence⁹⁰ and a depoliticised and professional bureaucracy. Political parties in power and opposition would rather focus on creating parallel institutions like the caretaker government that will neutralise the politicised bureaucracy for a brief period and then leave the favourable arrangement for reverse politicisation intact. This tendency conflicts with what Oslen calls a ‘Democratic Instrumental Vision’ of institutional reform.

10.4.2 *Opportunistic Handling of the Caretaker Government*

Bangladesh’s cycle of innovation, handling, and destruction of the institution of caretaker government constitutes another textbook example of the lack of a ‘Democratic Instrumental Vision’ in democratic consolidation and institution

⁸⁴ *ibid.* art 126.

⁸⁵ *Kazi Mamunur Rashid v. Government of Bangladesh* 28 BLD (2008) (HCD) 87 para 24 (per Mamnun Rahman J).

⁸⁶ The Election Commission Secretariat Act 2009.

⁸⁷ *ibid.* ss 3(2), 5(1), 6(2), and 14.

⁸⁸ M Jashim Ali Chowdhury, *An Introduction to the Constitutional Law of Bangladesh* (Book Zone, Chittagong 2016) 545–46.

⁸⁹ Shaheen Mozaffar and Andreas Schedler, ‘The Comparative Study of Electoral Governance: Introduction’ (2002) 223(1) *International Political Science Review* 5, 8.

⁹⁰ Constitution (n 66) art 137.

building. The concept of Caretaker Government was aired in 1994 as an oven-ready solution to the country's life-long problems with electioneering. The proponents of the model looked back to 1991 and blatantly emphasised that the judges of the Supreme Court could fix the nation's electoral problem.⁹¹ This view was in an apparent disregard of Bangladesh's troubling past of higher court judges' controversial connivance with various extra-constitutional and martial law regimes.⁹² Expectedly, the judges' brokerage of the caretaker government caused rampant politicisation of the judiciary, scandalisation of the judges and compromise of judicial independence.⁹³

On the other side of the aisle, while passing the Thirteenth Amendment, the ruling party BNP – forced to introduce it – framed the system as a reluctant concession and tried, in every possible way, to weaken the Chief Adviser *vis-à-vis* a partisan President.⁹⁴ It created a system of dual government that contained a looming threat of destabilising the election-time government.⁹⁵ Days before the Seventh Parliamentary Election in 1996, BNP appointed President Abdur Rahman Biswas exercised his military powers in a dubious way which almost invited a military coup and caused the fall of Justice Habibur Rahman's caretaker government.⁹⁶ Operationally, the Chief Advisers of the 1996 and 2001 caretaker governments found their constitutional mandate unclear and had often been forced to perform various balancing acts in the face of competing demands of the political parties. As Akter and Zafarullah put it, their role has always been managing by compromising.⁹⁷ The system, therefore, marked a 'hotchpotch' that violated 'the entire scheme of the Constitution'.⁹⁸

From a democratic instrumental view, Bhuiyan's evaluation of the Thirteenth Amendment reveals that the system was introduced neither through an expert-driven process nor through public participation, careful study of the nation's political

⁹¹ Md Zakir Hossain and M Jashim Ali Chowdhury, 'The Caretaker Government: A Constitutional Evaluation and Search for Alternatives' (in Bangla), (2014) 19 *The Chittagong University Law Journal* 228, 243–44.

⁹² Justice Mustafa Kamal, *Bangladesh Constitution Trends and Issues* (The University of Dhaka, Dhaka 1994).

⁹³ Chowdhury (n 10) 220–24.

⁹⁴ Hossain and Chowdhury (n 91) 236.

⁹⁵ Habib Zafarullah and Muhammad Yeahia Akhter, 'Non-Political Caretaker Administrations and Democratic Elections in Bangladesh: An Assessment' (2003) *Government and Opposition* 345, 362–63.

⁹⁶ Hossain and Chowdhury (n 91) 237.

⁹⁷ Zafarullah and Akhter (n 95) 365.

⁹⁸ *Abdul Mannan Khan v. Bangladesh* 64 DLR (AD) (2012) 107, 428 (per S K Sinha J); Full text available in <http://ago.portal.gov.bd/sites/default/files/files/ago.portal.gov.bd/page/7f393557_475c_4317_b42a_5a850868beae/Constitutional%2013th%20Amendment%20Case.pdf> accessed on 7 January 2022. Page numbers referred here correspond to the full text available in the above web address.

history or deliberative bargain between the political parties.⁹⁹ The BNP MPs elected in the sixth parliament were not the people's representatives in the true sense of the term. The opposition parties staging street agitation demanding its introduction did not demand any participation in drafting the bill, nor were they interested in wasting time in negotiating its texts. They were interested in the BNP government resigning and making way for them.¹⁰⁰

Assuming the power the very next time, in 2001, the BNP-JI coalition government amended the Constitution to ensure that a judge favourable to them led the next caretaker government of 2006.¹⁰¹ The plot failed in the face of violent street agitation by the opposition parties. Then, the BNP appointed President Iaj Uddin Ahmed staged a constitutional coup and usurped the leadership of the October 2006 caretaker government.¹⁰² It invited another round of military intervention in politics. A so-called 'military-backed caretaker government' continued for 2 years (2007–2008)¹⁰³ and conducted the Ninth (2008) Parliamentary Election.¹⁰⁴ While BNP may be accused of tampering with the system in nakedly visible ways, both AL and BNP calculatedly politicised the judicial appointment process in their bids to get favourable Chief Justices leading the caretaker governments over the years.¹⁰⁵

Later in 2011, the Appellate Division of the Supreme Court of Bangladesh controversially¹⁰⁶ declared the election time system of the caretaker government unconstitutional.¹⁰⁷ The Court declared it unconstitutional but still supported the idea of holding at least two next parliamentary elections under the caretaker

⁹⁹ Md. Shahjahan Hafez Bhuiyan, 'The Caretaker Government in Bangladesh: An Appraisal of its Formation' (2003) 40 *Politics Administration and Change* 33, 46–47.

¹⁰⁰ Md Morshedul Islam, '1996's Non-party Caretaker Government Movement and the Role of Opposition in Bangladesh: A Politico-legal Analysis' (2016) 3(6) *Global Journal of Political Science and Administration* 20.

¹⁰¹ Nizam Ahmed, 'Party Politics under a Non-party Caretaker Government in Bangladesh: The Fakhruddin Interregnum (2007–09)' (2010) 48(1) *Commonwealth and Comparative Politics* 23.

¹⁰² M Shah Alam, 'Article 58C and assumption of office of the Chief Adviser by the President' *The Daily Star*, Dhaka, 11 November 2006), <<https://www.thedailystar.net/law/2006/11/02/index.htm>> accessed 28 February 2022.

¹⁰³ Quddusi (n 8) 138.

¹⁰⁴ Nizam Ahmed, 'Critical Elections and Democratic Consolidation: The 2008 Parliamentary Election in Bangladesh' (2011) 19(2) *Contemporary South Asia* 137.

¹⁰⁵ Abdul Mannan Khan (n 98) 313 (per Khairul Hoque CJ)

¹⁰⁶ Mohammad Omar Faruque, 'Integrity Crisis of the Electoral System in Bangladesh: the 13th Amendment Judgment and Beyond' *Workshop on Constitutional Resilience in South Asia* (University of Melbourne, Australia, 5–7 December 2019); Ridwanul Hoque, 'Constitutionalism and the Judiciary in Bangladesh' in Sunil Khilnani, Vikram Raghavan and Arun K Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (OUP, New Delhi 2013) 317.

¹⁰⁷ Abdul Mannan Khan (n 98).

government system.¹⁰⁸ The AL government, however, abusively seized the opportunity. Months before the Supreme Court judgement, an All-Party Parliamentary Committee was finalising proposals for the upcoming fifteenth amendment aiming to restore the dislodged principles of the original Constitution. It consulted hundreds of constitutional experts, Supreme Court judges, civil society leaders, journalists, and people from different walks of life.¹⁰⁹ As of March 2011, the Committee was convinced that the caretaker government was still necessary but needed reform.¹¹⁰ However, allegedly after a ‘meeting’ with the Prime Minister in May 2011,¹¹¹ the Committee got muted. The Fifteenth Amendment abolished the caretaker government, despite a visible necessity of the system’s continuance on a short term at least.¹¹² The amendment was passed literally within minutes without any substantial discussion on the floor.¹¹³ It epitomises the institutional weaknesses of the political parties and their falling hostages to the whims of the persons in the lead.¹¹⁴ Thus, the caretaker government’s ‘unusual legal structure’ was created and abolished as a mere élite preference rather than deliberative and participatory decision making.¹¹⁵

10.5 Conclusion

In 1993, Samuel Huntington famously proposed a ‘two turnover tests’¹¹⁶ for judging democratic consolidation in a country that might have finished its transition from authoritarianism to a nascent democracy. Put simply, Huntington argued that a

¹⁰⁸ Nizam Ahmed, ‘Abolition or Reform? Non-party Caretaker System and Government Succession in Bangladesh’ (2011) 100 (414) *Round Table: The Commonwealth Journal of International Affairs* 303.

¹⁰⁹ Khan (n 9) 11–13.

¹¹⁰ Ahmed (n 101).

¹¹¹ Maimul Ahsan Khan, ‘Constitutional Disaster and ‘Legal’ Impunity: Constitutional Amendments in Perspective’ Asian Human Rights Commission <<http://www.humanrights.asia/resources/journals-magazines/article2/special-report-inexistent-rule-of-law-in-bangladesh/04-2/>> accessed 18 November 2021

¹¹² Sonia Zaman Khan, *The Politics and Law of Democratic Transition: Caretaker Government in Bangladesh* (Routledge, London 2017) 198.

¹¹³ Khan (n 111).

¹¹⁴ M Ehteshamul Bari, ‘The Incorporation of the System of Non-Party Caretaker Government in the Constitution of Bangladesh in 1996 as a Means of Strengthening Democracy, Its Deletion in 2011 and the Lapse of Bangladesh into Tyranny Following the Non-Participatory General Election of 2014: A Critical Appraisal’ (2018) 28(1) *Transnational Law and Contemporary Problems* 27.

¹¹⁵ Khan (n 112) 2.

¹¹⁶ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1993) 266–67.

newly emerged democracy might be considered “consolidated” once it survives two consecutive electoral turnovers of power between competing political forces. Though there are other substantive standards for measuring democratic consolidation,¹¹⁷ Bangladesh seems to fail even this procedural standard set by Huntington. Until 1996, the country could not complete a single cycle of Huntington’s ‘two consecutive turn-overs’. Powers did not pass democratically and electorally from the AL government (1972–1975) to BAKSAL regime (1975), from BAKSAL to the three martial law administrators Khandker Mushtaq Ahmed, Justice A S M Sayem and Major General Ziaur Rahman (1975–1977), from Ziaur Rahman to Justice Abdus Sattar (1981), from Justice Abdus Sattar to General Ershad (1982) and from Ershad to Justice Shahabuddin (1990).

After the relatively free fifth parliamentary election (1991), the sixth parliamentary election (1996) was farcical. Likewise, the seventh (1996) and eighth (2001) parliamentary elections did not mark the willing and good faith transfers of power between the two political rivals. The caretaker government of 1996 was, by every means, a reluctant concession on BNP’s part.¹¹⁸ AL never graciously accepted the caretaker government and its election in 2001.¹¹⁹ The ninth parliamentary election (2008) did not mark another peaceful turnover. It was held under an extra-constitutional and military-backed regime that followed a violent and chaotic political disorder surrounding the formation of the 2006 caretaker government.¹²⁰ Since then, the elections have been a matter of rigging in broad daylight.

As Muzaffar and Seidher put it, the difference between authoritarian and democratic actors lies in their attitude towards uncertainty. While the former seeks to reduce the uncertainty of outcomes, the latter work to reduce the uncertainty of institutions.¹²¹ For the five decades of Bangladesh’s existence, political parties worked to reduce the uncertainty of their retaining power. Therefore, the country has failed to establish any political consensus about the periodic and orderly power transfer. Different make-shift solutions and proposals inspired by temporal impulses have been suggested. In contrast, the conversation on the political party system, intra-party democracy, professional civil service, independent Election Commission, or other integrity institutions, and most importantly, an institutionalised system of competition for power has been consciously avoided. Given the situation, on the eve of the fiftieth anniversary of Bangladesh’s independence, its electoral democracy is reduced to ‘a fond memory’¹²² of the past.

¹¹⁷ Doh Chull Shin, ‘On the Third Wave of Democratization: A Synthesis and Evaluation of Recent Theory and Research’ (1994) 47(1) *World Politics* 135, 149–150.

¹¹⁸ Bhuiyan (n 99).

¹¹⁹ Kazi S M Khasrul Alam Quddusi, ‘Bangladesh in the Fifth Decade: A Balance Sheet’ (2014) 18(4) *World Affairs The Journal of International Issues* 152, 163.

¹²⁰ Baladas Ghoshal, ‘The Anatomy of Military Interventions in Asia: The Case of Bangladesh’ (2009) 65(1) *India Quarterly* 67.

¹²¹ Mozaffar and Schedler (n 89) 11.

¹²² Riaz (n 7).

References

Books

- Ahmed, Moudud. 1983. *Bangladesh: Era of Sheikh Mujibur Rahman*. Dhaka: University Press Limited.
- Ahmed, Fakhruddin. 1998. *The Caretakers: A Firsthand Account of the Interim Government of Bangladesh (1990–1991)*. Dhaka: University Press Limited.
- Ahmed, Nizam. 2004a. *Non-party Caretaker Government in Bangladesh: Experience and Prospect*. Dhaka: University Press Limited.
- Chowdhury, M. Jashim Ali. 2016. *An Introduction to the Constitutional Law of Bangladesh*. Chittagong: Book Zone.
- Goodin, R.E. 1996. *The Theory of Institutional Design*. Cambridge: Cambridge University Press.
- Hakim, Muhammad A. 1993. *Bangladesh Politics: The Shahabuddin Interregnum*, 38. Dhaka: University Press Limited.
- Huntington, Samuel P. 1993. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press.
- Hyden, Goran. 2006. *African Politics in Comparative Perspective*. New York: Cambridge University Press.
- Kamal, Mustafa. 1994. *Bangladesh Constitution Trends and Issues*. Dhaka: The University of Dhaka.
- Khan, Sonia Zaman. 2017. *The Politics and Law of Democratic Transition: Caretaker Government in Bangladesh*. London: Routledge.
- Olsen, Johan P. 2010. *Governing Through Institution Building: Institutional Theory and Recent European Experiments in Democratic Organization*. Oxford: OUP.

Chapters in Edited Books

- Ahmed, Nizam. 2001. Bangladesh. In *Elections in Asia: A Data Handbook*, ed. D. Nohlen, F. Grotz, and C. Hartmann, 528. Oxford: OUP.
- Chowdhury, M. Jashim Ali. 2015. Elections in ‘Democratic’ Bangladesh. In *Unstable Constitutionalism: Law and Politics in South Asia*, ed. Mark Tushnet and Madhav Khosla, 227–228. New York: Cambridge University Press.
- Croissant, A, D Kuehn, P Lorenz and PW Chambers 2013. Bangladesh: From Militarized Politics to Politicized Military. In *Democratization and Civilian Control in Asia*, 118–135. London: Springer.
- Hasan, Samiul. 2006. Corruption, Accountability and Political Parties in Bangladesh: Connections and Consequences. In *Democratic Ideals, Governance, and Corruption in South Asia*, ed. T. May and B. Ray, 9–10. Kolkata: Freedom Press.
- Hoque, Ridwanul. 2013. Constitutionalism and the Judiciary in Bangladesh. In *Comparative Constitutionalism in South Asia*, ed. Sunil Khilnani et al., vol. 317. New Delhi: OUP.
- . 2021. The Politics of Unconstitutional Amendments in Bangladesh. In *The Law and Politics of Unconstitutional Constitutional Amendments in Asia*, ed. Rehan Abeyratne and Ngoc Son Bui, 210–228. London: Routledge.
- Kuchnek, Stanley A. 2010. Corruption and Criminalization of Politics in South Asia. In *Routledge Handbook of South Asian Politics: India, Pakistan, Bangladesh, Sri Lanka and Nepal*, ed. Paul Brass, 377. London: Routledge.

- Kumarasingham, Harshan. 2016. Eastminster – Decolonisation and State- Building in British Asia. In *Constitution- Making in Asia, Decolonisation and State-Building in the Aftermath of the British Empire*, ed. Harshan Kumarasingham, 1–35. London: Routledge.
- Moniruzzaman, M 2019. Electoral Legitimacy, Preventive Representation, and Regularization of Authoritarian Democracy in Bangladesh in Ryan Merlin Yonl (ed) *Elections: A Global Perspective*, 1–15. Online: IntechOpen.
- Riaz, Ali. 2019. Bangladesh: From an Electoral Democracy to a Hybrid Regime (1991–2018). In *Voting in a Hybrid Regime Explaining the 2018 Bangladeshi Election, Politics of South Asia*, ed. Ali Riaz, 21–31. Singapore: Palgrave Pivot.
- Wold, Eric. 2001. Kinship, Friendship and Patron-Client Relations in Complex Societies. In *Pathways of Power*, ed. Eric Wolf, 167. Berkeley: University of California Press.

Articles

- Abedin, Md Joynal. 2020. Legitimacy Crisis in Bangladesh: A Case Study of 10th General Election. *European Journal of Political Science Studies* 392: 1.
- Ahmed, Samina Ahmed. 1991. Politics in Bangladesh: The Paradox of Military Intervention. *Regional Studies* 9 (1): 58.
- Ahmed, Nizam. 2003. From Monopoly to Competition: Party Politics in the Bangladesh Parliament (1973–2001). *Pacific Affairs* 76 (1): 55.
- . 2004b. Non-Party Caretaker Governments and Parliamentary Elections in Bangladesh: Panacea or Pandora's Box? *South Asian Survey* 11 (1): 49–73.
- . 2010. Party Politics Under a Non-party Caretaker Government in Bangladesh: The Fakhruddin Interregnum (2007–09). *Commonwealth & Comparative Politics* 48 (1): 23.
- . 2011a. Critical Elections and Democratic Consolidation: The 2008 Parliamentary Election in Bangladesh. *Contemporary South Asia* 19 (2): 137–152.
- . 2011b. Abolition or Reform? Non-party Caretaker System and Government Succession in Bangladesh. *Round Table: The Commonwealth Journal of International Affairs* 100 (414): 303.
- Alam, Quamrul, and Julian Teicher. 2012. The State of Governance in Bangladesh: The Capture of State Institutions. *South Asia: The Journal of South Asian Studies* 35 (4): 858.
- Anderson, Robert S. 1976. Impressions of Bangladesh: The Rule of Arms and the Politics of Exhortation. *Pacific Affairs* 49 (3): 443.
- Azad, Abul Kalam, and Charles Crothers. 2012. Bangladesh: An Umpired Democracy. *Journal of Social and Development Sciences* 3 (6): 203.
- Baxter, Craig. 1992. Bangladesh a Parliamentary Democracy, if They Can Keep It. *Current History* 91, 132 (563): –136.
- Baxter, Craig, and M. Rashiduzzaman. 1981. Bangladesh Votes: 1978 and 1979. *Asian Survey* 21 (4): 485.
- Bertocci, Peter J. 1986. Bangladesh in 1985: Resolute Against the Storms. *Asian Survey* 26 (2): 229.
- Bhuiyan, Md. Shahjahan Hafez. 2003. The Caretaker Government in Bangladesh: An Appraisal of its Formation. *Politics Administration and Change* 40: 33.
- Bratton, Michael. 2007. Formal Versus Informal Institutions in Africa. *Journal of Democracy* 18: 97.
- Feldman, Shelley. 2015. Bangladesh in 2014: Illusive Democracy. *Asian Survey* 55 (1): 67–74.
- Ghoshal, Baladas. 2009. The Anatomy of Military Interventions in Asia: The Case of Bangladesh. *India Quarterly* 65 (1): 67–82.
- Haque, Ahmed Shafiqul, and Muhammad A. Hakim. 1993. Elections in Bangladesh: Tools of Legitimation. *Asian Affairs: An American Review* 19 (4): 248.

- Hossain, Golam. 1995. Bangladesh in 1994: Democracy at Risk. *Asian Survey* 35 (2): 172–178.
- Huq, Abul Fazl Huq. 1973. Constitution-Making in Bangladesh. *Pacific Affairs* 46 (1): 59.
- Islam, Syed Serajul Islam. 1984. The State in Bangladesh under Zia (1975–81). *Asian Survey* 24 (5): 556.
- Islam, S. Aminul. 2006. The Predicament of Democratic Consolidation in Bangladesh. *Bangladesh e-Journal of Sociology* 3 (2): 4.
- Islam, Md Morshedul. 2016. 1996's Non-party Caretaker Government Movement and the Role of Opposition in Bangladesh: A Politico-legal Analysis. *Global Journal of Political Science and Administration* 3 (6): 20.
- Khan, Zillur R. 1997a. Bangladesh's Experiments with Parliamentary Democracy. *Asian Survey* 37 (6): 581.
- . 1997b. Bangladesh's Experiments with Parliamentary Democracy. *Asian Survey* 37 (6): 581.
- Khan, Mushtaq. 2005. Markets, States and Democracy: Patron-Client Networks and the Case for Democracy in Developing Countries. *Democratization* 12, 704 (5): –724.
- Khan, Adeeba Aziz. 2015. The Politics of Constitutional Amendments in Bangladesh: The Case of the Non-political Caretaker Government. *International Review of Law* 3: 11.
- Kochanek, Stanley A. 2000. Governance, Patronage Politics, and Democratic Transition in Bangladesh. *Asian Survey* 40 (3): 530.
- Lauth, Hans Joachim. 2000. Informal Institutions and Democracy. *Democratization* 7: 21.
- Maniruzzaman, Talukder. 1992. The Fall of the Military Dictator: 1991 Elections and the Prospect of Civilian Rule in Bangladesh. *Pacific Affairs* 65 (2): 203–206.
- Moniruzzaman, M. 2009. Parliamentary Democracy in Bangladesh: An Evaluation of the Parliament during 1991–2006. *Commonwealth and Comparative Politics* 47 (1): 100–126.
- Moten, Rashid A. 1981. Parliamentary Elections in Bangladesh. *The Indian Journal of Political Science* 42 (2): 58.
- Mozaffar, Shaheen, and Andreas Schedler. 2002. The Comparative Study of Electoral Governance: Introduction. *International Political Science Review* 223 (1): 5.
- Quddusi, Kazi S.M. Khasrul Alam. 2009. Criminalisation, Militarization and Democratic Restoration in Bangladesh. *World Affairs: The Journal of International Issues* 13 (4): 136.
- . 2014. Bangladesh in the Fifth Decade: A Balance Sheet. *World Affairs: Journal of International Issues* 18 (4): 152.
- Rashiduzzaman, M. 1997. Political Unrest and Democracy in Bangladesh. *Asian Survey* 37 (3): 260–268.
- Riaz, Ali. 2014a. Bangladesh's Failed Election. *Journal of Democracy* 25 (2): 119, 129.
- . 2014b. Shifting Tides in South Asia: Bangladesh's Failed Election. *Journal of Democracy* 25 (2): 119.
- Sarker, Elias, and Faraha Nawaz. 2019. Clientelism, Partyarchy and Democratic Backsliding: A Case Study of Local Government Elections in Bangladesh. *South Asian Survey* 26 (1): 70.
- Shin, Doh Chull. 1994. On the Third Wave of Democratization: A Synthesis and Evaluation of Recent Theory and Research. *World Politics* 47 (1): 135.
- Trubowitz, Peter, and Nicole Mellow. 2005. "Going Bipartisan": Politics by Other Means. *Political Science Quarterly* 120 (3): 433–434.
- Uddin, Nasir. 2016. Recent Trends of Local Government Elections in Bangladesh: An Analysis on Profile and Politics. *Public Affairs and Governance* 4, 166 (2).
- Zafarullah, Habib, and Muhammad Yeahia Akhter. 2003. Non-Political Caretaker Administrations and Democratic Elections in Bangladesh: An Assessment. *Government and Opposition* 35: 345–369.

Internet Sources

- Ahsan, Syed Badrul. 2017. Ershad, his coup and stories of military rule. *The Bdnews24.com*, Dhaka, June 29. <https://opinion.bdnews24.com/2017/06/29/ershad-his-coup-and-stories-of-military-rule/>. Accessed 5 Jan 2021.
- Alam, M Shah. 2006. Article 58C and assumption of office of the Chief Adviser by the President. *The Daily Star*, Dhaka, November 11. <https://www.thedailystar.net/law/2006/11/02/index.htm>. Accessed 28 Feb 2022.
- Bhattacharjee, Partha Pratim and Mohiuddin Alamgir. 2021. EC Formation: Chance of a Law Slim. *The Daily Star*, Dhaka, December 23. <https://www.thedailystar.net/news/bangladesh/politics/news/ec-formation-chance-law-slim-2923456>. Accessed 7 Jan 2022.
- Chowdhury, M Jashim Ali. 2021. In Search of Parliamentary Opposition in Bangladesh. *IACL-AIDC Blog*, January 21. <https://blog-iacl-aide.org/2021-posts/2021/1/21/in-search-of-parliamentary-opposition-in-bangladesh>. Accessed 28 Feb 2022.
- Chowdhury, M Jashim Ali. 2017. The EC Search Committee: Towards a “Consensual” Constitutional Convention? *The Daily Star*, Dhaka, February 7. <https://www.thedailystar.net/law-our-rights/towards-consensual-constitutional-convention-1356955>. Accessed 28 Feb 2022.
- Durjoy, Nure Alam. 2013. Akbar Ali Khan: Search Committee Was Not Successful. *The Dhaka Tribune*, Dhaka, February 11. <https://archive.dhakatribune.com/bangladesh/politics/2017/02/11/akbar-ali-khan-search-committee-not-successful>. Accessed 7 Jan 2022.
- Islam, Zyma and Partha Pratim Bhattacharjee. 2020. Dhaka City Polls: Turnout Under 20pc in One Third of Centres. *The Daily Star*, Dhaka, February 6. <https://www.thedailystar.net/frontpage/dhaka-city-elections-2020-vote-turnout-less-20-percent-1864021>. Accessed 28 Feb 2022.
- Khan, Maimul Ahsan, ‘Constitutional Disaster and ‘Legal’ Impunity: Constitutional Amendments in Perspective’ Asian Human Rights Commission. <http://www.humanrights.asia/resources/journals-magazines/article2/special-report-inexistent-rule-of-law-in-bangladesh/04-2/>. Accessed 18 Nov 2021.
- Majumder, Badiul Alam. 2022. Search Committee for EC: Transparency can counter confidence crisis. *The Daily Star*, Dhaka, February 23. <https://www.thedailystar.net/views/opinion/news/search-committee-ec-transparency-can-counter-confidence-crisis-2968191>. Accessed 28 Feb 2022.
- Sarkar, Ashutosh and Mohiuddin Alamgir. 2021. Law for EC Appointments: It’s Needed More than Ever Now. *The Daily Star*, Dhaka, September 26. <https://www.thedailystar.net/news/bangladesh/news/law-ec-appointments-its-needed-more-ever-now-2184116>. Accessed 28 Feb 2022.
- Staff Correspondence. 1986. Violence Mares Election in Bangladesh 1985. *The New York Times*, August 5. <https://www.nytimes.com/1986/05/08/world/violence-mars-bangladesh-election.html>. Accessed 5 Jan 2022.
- Staff Correspondent. 2022. With 322 names proposed for Election Commission, search committee is set to make final choices. *Bdnews24.com*, Dhaka, February 15. <https://bdnews24.com/bangladesh/2022/02/15/with-322-names-proposed-for-election-commission-search-committee-is-set-to-make-final-choices>. Accessed 28 Feb 2022.
- The Chief Election Commissioner and other Election Commissioners Appointment Act (No. 1), 2022. <http://bdlaws.minlaw.gov.bd/act-details-1397.html>. Accessed 28 Feb 2022.

Documents

- Faruque, Mohammad Omar 2019. Integrity Crisis of the Electoral System in Bangladesh: The 13th Amendment Judgment and Beyond. *Workshop on Constitutional Resilience in South Asia* (University of Melbourne, Australia, December 5–7).
- Levitsky, Steven and Gretchn Helmke 2003. Informal Institutions and Comparative Politics: A Research Agenda (Working Paper 307), Kellogg Institute for International Studies, September 5.

M Jashim Ali Chowdhury is a Lecturer at the Law School, University of Hull, UK. Formerly, he was an Associate Professor of Law at the University of Chittagong, Bangladesh. He obtained LLB (Hons) and LLM from the University of Chittagong, LLM in International and Comparative Law from Tulane University of Louisiana, USA and PhD from King's College London, UK. He has published extensively on constitutional issues in different journals including Bangladesh Journal of Law, Dhaka University Law Journal, Chittagong University Journal of Law, Rajshahi University Law Journal, Northern University Journal, BRAC University Journal, Metropolitan University Journal, Jagannath University Journal, Jahangirnagar University Journal, Islamic University Journal, Bangladesh, Indian Journal of Constitutional Law, Comparative and Administrative Law Quarterly (India), Tulane University GLAT Review (USA) and Journal of Parliamentary and Political Law (Canada). Mr. Chowdhury has contributed several book chapters in books published by BILIA (Bangladesh), Chittagong University (Bangladesh), Routledge (UK), Hart Publishing (UK) and the Cambridge University Press (USA). He is the author of four books titled – *An Introduction to the Constitutional Law of Bangladesh*, *The Law of Evidence: An Easy Reader (Bangla)*, *A Textbook on Muslim Personal Law* and *Comparative Constitutional Law: Issues, Debates and Stories from the UK, US and Indian Jurisdictions*.

Part III
Specialised Constitutional Rights
and Issues

Chapter 11

Restrictions on the Constitutional Fundamental Rights in Bangladesh: Wednesbury Unreasonableness and Proportionality



Azhar Uddin Bhuiyan

Abstract The Bangladesh Constitution provides that some fundamental rights are absolute while others are qualified on different grounds. Such an architecture of the autochthonous Constitution leaves discretion in the hands of the court to interpret and develop contents of fundamental rights jurisprudence, administrative discretion in the executive, and policy space to legislature for effectively governing the country. This chapter classifies fundamental rights into different types and discusses different standards of reviewing restrictions, notably the Wednesbury Unreasonableness Test (WUT) and Proportionality Test (PT). Relying on textualism, this chapter shows that the Constitution mandates different standards of judicial scrutiny for different types of fundamental rights. By showing the difference between the utility of these two tests, the chapter argues that the Constitution has accommodation for both WUT and PT. Despite providing a more transparent and clearer framework to review executive and legislative actions involving fundamental rights, why the Supreme Court of Bangladesh has shown explicit judicial reticence in accepting PT is also explored here. The chapter concludes that time has changed and regardless of history, the PT should be applied in assessing reasonableness of restrictions on certain types of fundamental rights.

Keywords Fundamental rights · Judicial review · Wednesbury unreasonableness test · Proportionality test

A. U. Bhuiyan (✉)

Department of Law, University of Dhaka, Dhaka, Bangladesh

e-mail: azhar.rifat@yahoo.com

11.1 Introduction

The Framers of the Constitution (FoC) of the People's Republic of Bangladesh provided differing standard of protection to different kinds of human rights.¹ The Fundamental Principles of State Policies (FPSPs) in Part II of the Constitution, mainly incorporates economic, social, and cultural Rights (ESC).² Although these FPSPs are judicially unenforceable,³ they have four other roles to play in the state: application by the State in the making of laws, usage as guide to the interpretation of the Constitution and of the other laws of Bangladesh, and usage as the basis of the work of the State and of its citizens.⁴ On the other hand, major civil and political rights have been given the status of fundamental rights in the Bangladesh Constitution (part III).

Notably, a large number of such fundamental rights are not given absolute protection, rather they have qualified constitutional protection. A closer look at the qualifiers before the word 'restrictions' reveal that the FoCs have used different phrases to impose different kinds of restrictions on different fundamental rights. For some, the FoCs have left option open to impose 'any' restriction, while for others only 'reasonable' restriction may be imposed. Thus, on different permissible grounds, the citizen's fundamental rights can be curtailed by enacting laws. Whether such restrictions are within the mandate of the constitution, they are subject to judicial review and open to be challenged in the Supreme Court of Bangladesh (SCOB). In such judicial review exercise, the SCOB has acknowledged the existence of two distinct standards of review coming from comparative law jurisprudence⁵: the Wednesbury Unreasonableness Test (WUT),⁶ and its non-identical cousin, Proportionality Test (PT).⁷

¹ There was a detailed discussion prominently by Suranjit Sen Gupta in the constituent assembly debates on different models of offering protection to human rights under constitutional regime. He mentioned case studies from jurisdictions including India, Ireland etc. See the debate contributions of Dr. Kamal Hossain, the Chairman of the Constitution Draft Committee, and the lone opposition member of the constituent assembly, Suranjit Sen Gupta. Kawser Ahmed, *Proceedings of the Constituent Assembly of Bangladesh: Debates on the Making of the Constitution* (Dhaka: Pencil Publications 2021) 33–35.

² However, Muhammad Ekramul Haque shows that FPSPs do not only incorporate ESC rights, Muhammad Ekramul Haque, 'Does Part II of the Constitution of Bangladesh contain only economic and social rights?' (2012) 23(1) *Dhaka University Law Journal* 45–51.

³ The Bangladesh Constitution, art 8(2).

⁴ Ibid, art 8(2).

⁵ *Ekushey Television Ltd v Dr. Chowdhury Mahmood Hasan* (2003) 55 DLR 26.

⁶ For detail discussion on the test see, G. L. Peiris, 'Wednesbury Unreasonableness: The Expanding Canvas' (1987) 46(1) *The Cambridge Law Journal* 53–82; Simon Parsons, 'Wednesbury Unreasonableness: Alive & Kicking?' (2020) 7874 *New Law Journal* 18 <https://www.newlawjournal.co.uk/docs/default-source/article_files/nlj_2020_issue7874_february_procedurepractice-parson.pdf?sfvrsn=5059b0a5_1> accessed 10 August 2022.

⁷ For detail discussion on the doctrine see, Carlos Bernal-Pulido, 'The Migration of Proportionality Across Europe' (2013) 11 *New Zealand Journal of Public & International Law* 483; Joao Andrade Neto, *Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil* (Springer 2018); Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72; Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013).

In adjudicating any exercise of legislative or executive power of Parliament or the Government respectively pertaining to the curtailment of fundamental rights, the SCOB has taken resort to WUT explicitly and at times exploited the shadow of PT without mentioning it expressly.⁸ More importantly, the SCOB has explicitly declined to utilise PT in adjudicating a challenge against any legislative or executive action restricting fundamental rights.⁹ This chapter fills up the gap in the existing literature by showing that the wholesale use of WUT in adjudicating fundamental rights is not permitted in the Constitution of Bangladesh. It argues that PT is a better means for protecting some fundamental rights over WUT. However, it points out that both these tests can concurrently be accommodated in the constitutional jurisprudence of Bangladesh.

This chapter first analyses the constitutional framework of Bangladesh for restrictions on fundamental rights. Here, a classification of fundamental rights is shown based on the approach of the text of the Constitution. The next part deals with different standards of reviewing the restrictions on fundamental rights showing their strength and weaknesses. The approach of the SCOB is analysed in the following part dividing the discussion according to the types of fundamental rights. Finally, it provides justifications for borrowing and incorporating the proportionality test in the constitutional jurisprudence of Bangladesh.

11.2 Constitutional Framework in Bangladesh for Restrictions on Fundamental Rights

The Constitution of Bangladesh incorporates 23 provisions on fundamental rights. Except article 26 that delineates the status of fundamental rights over any law in Bangladesh incorporating doctrine of eclipse and severability,¹⁰ there are 22 substantive provisions relating to fundamental rights. These 22 provisions do not offer equal protection, rather the level of constitutional guarantee varies from right to right.

Some fundamental rights are absolute meaning no restriction can be imposed; in some cases, only ‘reasonable’ restriction can be imposed; and in others ‘any’ restriction can be levied. In addition, there are three articles 46, 47, and 47A that may have impact on all fundamental rights. Evidently in interpreting the restrictions imposed on fundamental rights, the SCOB has not made the distinction, rather adopted the wholesale use of WUT. The following table classifies the different approaches adopted by the FoC in granting the power to the Law-Making Authorities (LMAs) to restrict fundamental rights (Table 11.1).

⁸ *Ekushey Television Ltd* (n 5).

⁹ *Ibid.*

¹⁰ Muhammad Ekramul Haque, ‘Protecting fundamental rights through restricted legislative competence: Application of the doctrine of eclipse and severability’ (2006) 17(1) *Dhaka University Law Journal* 49–62.

Table 11.1 Classification of fundamental rights based on impossible restriction

'No' restriction can be imposed (Type 1 FRs)	'Reasonable' restriction can be imposed (Type 2 FRs)	'Any' restriction can be imposed (Type 3 FRs)	Miscellaneous
Art. 27: Equality before law	Art. 36: Freedom of movement	Art. 40: Freedom of profession or occupation	Art. 46: Power to provide indemnity
Art. 28: Discrimination on grounds of religion, etc.	Art. 37: Freedom of assembly	Art. 41: Freedom of religion*	Art. 47: Saving for certain laws
Art. 29: Equality of opportunity in public employment	Art. 38: Freedom of association	Art. 42: Rights to property	Art. 47A: Inapplicability of certain articles
Art. 30: Prohibition of foreign titles, etc.	Art. 39: Freedom of thought and conscience, and of speech	Art. 45: Modification of rights in respect of disciplinary law	
Art. 31: Right to protection of law	Art. 43: Protection of home and correspondence		
Art. 32: Protection of right to life and personal liberty			
Art. 33: Safeguards as to arrest and detention			
Art. 34: Prohibition of forced labour			
Art. 35: Protection in respect of trial and punishment			
Art. 44: Enforcement of fundamental rights			

*Although art. 41 of the Constitution neither expressly mentions that 'reasonable restriction' nor 'any restriction' may be on freedom of religion, it states that 'subject to law' freedom of religion shall exist for the citizens. It does not mention whether 'reasonable restriction' or 'any restriction' can be imposed on the substantive content of the freedom of religion in Bangladesh. In the explicit absence of 'reasonable' before law, it may be contemplated that 'any restriction' may be imposed on the freedom of religion by law subject to Article 31 of the Constitution

There can be no question about fundamental rights which are absolute in their provisions. They have absolute protection, and no restriction can be imposed on them. However, a deeper look at the text of the Constitution reveals that the FoC used different connotations ('reasonable restriction' and 'any restriction') to pinpoint the difference in restricting power of the LMAs in curtailing two different classes of fundamental rights. The approach of the FoC delineates that fundamental rights Type 2 and 3 cannot be placed in the same level of status. Because they considered Type 2 fundamental rights so sacred that only 'reasonable' restriction may be imposed on them. The position of the FoC on the Type 3 portrays that despite being fundamental rights, the LMAs may be given the power to impose restriction on them to help govern the country. Thus, it seems that the LMAs have a wide power to impose restrictions on Type 3 fundamental rights.

FKMA Munim observed that the acceptance of socialism in the Constitution of Bangladesh led to the omission of ‘reasonable’ before restriction in Type 3 fundamental rights.¹¹ He argued that absence of ‘reasonable’ before restriction, and ‘lawful’ before the content of the provision indicates that these rights are not actually intended to be fundamental rights.¹² However, Mahmudul Islam argues that such interpretation of Munim brushes aside the FoC’s novel idea that these rights deserve constitutional protection and have been placed accordingly as fundamental rights nevertheless. It is submitted that while Munim may have been right about the socialism part,¹³ Mahmudul Islam is right about the effect of articles 26 and 31 on the Type 3 fundamental rights that they are indeed constitutionally protected right.

Be that as it may, the Constitution needs to be understood holistically. Just because a provision allows the LMAs to impose ‘any restriction’ on some fundamental rights does not mean that such restrictions can be devoid of any reasonableness. Article 31 of the Constitution of Bangladesh ensures the citizens’ right to the protection of law and prohibits arbitrariness in all spheres. The rule of law is one of the founding pledges of the Constitution and it permeates through all the provisions of the Constitution. Thus, even if a constitutional provision may grant ‘any restriction’ imposing power to the LMAs, they need to pass the test of reasonableness.¹⁴

With such interpretation, it seems that both Type 2 and 3 fundamental rights have arrived at a similar level of status in terms of constitutional protection although the FoC contemplated differing standard of protection to them. To properly implement the contemplation of the FoC, it is submitted that when a restriction on fundamental rights is challenged in the SCOB, Type 3 fundamental rights should pass a lesser level of judicial scrutiny than Type 2 fundamental rights. In other words, for adjudicating a challenge against a restriction on Type 2, the bar of reasonableness should be higher, and they should be reasonable on its own merit unlike Type 3 where it is sufficient if the restriction is not unreasonable.¹⁵

¹¹ FKMA Munim, *Rights of the Citizens under the Constitution and Law* (Bangladesh Institute of Law and International Affairs 1975) 287.

¹² Ibid, 288.

¹³ Mahmudul Islam argues that such contention is not correct because a similar approach can be observed in the earlier constitution for people of this land, the Constitution of Pakistan 1962. However, I argue that although such approach may have been similar, socialism indeed have had impact on the thoughts of FoCs and the substantive content of these fundamental rights should reflect the same. See Mahmudul Islam, *Constitutional Law of Bangladesh* (3rd Edition, Mullick Brothers Ltd. 2012) 365.

¹⁴ Mahmudul Islam (n 14) 136.

¹⁵ Application of different levels of judicial scrutiny for different rights is not a new concept in global constitutionalism. See for details, Jeffrey M. Shaman, ‘Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny’ (1984) 45 Ohio State Law Journal 160; Ashutosh Bhagwat, ‘Purpose Scrutiny in Constitutional Analysis’ (1997) California Law Review 297; Gayle Lynn Pettinga, ‘Rational Basis With Bite: Intermediate Scrutiny by Any Other Name’ (1987) 62(3) Indiana Law Journal 779; R. Randall Kelso, ‘Justifying the Supreme Court’s Standard of Review’ (2021) 52(4) St. Mary’s Law Journal 973.

11.3 Tests for Reviewing Restrictions on FRs

11.3.1 *The Wednesbury Unreasonableness Test (WUT)*

The WUT developed in the UK Court of Appeal case, *Associated Provincial Picture Houses Ltd v Wednesbury Corp.*¹⁶ In this case, a statute that allowed an authority discretionary power to take a decision was challenged.¹⁷ The UK Court of Appeal decided that the court would not interfere in the discretionary power given in the statute unless the decision was such that no reasonable person could take it.¹⁸ In this case, certain conditions imposed by the Corporation of Wednesbury for Sunday performances in a Cinema theatre was challenged as ultra vires on the grounds, inter alia, of unreasonableness. Lord Greene M.R. explained the position as follows:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.¹⁹

The WUT developed as a narrow ground to vitiate the constitutionality of legislative and executive action. Only in those limited cases where it is unlikely for a reasonable person in the same position to make such decision, the WUT permits interference of the court. The WUT makes a surface level adjudication of any legislative or executive action. In the WUT, the action does not need to be reasonable on its own merit. It shall suffice if the action is not broadly unreasonable. The WUT is utilised in cases where the court does not want to wholeheartedly engage with the question of reasonability of an action but just want to make sure it is not manifestly unreasonable. Because sitting tight in the event of a grossly unreasonable action of the legislature or executive will question the legitimacy of the legal system.

It does not require understanding of rocket science to point out that the formulation of WUT does not precisely indicate what kind of decision is so outrageous that no reasonable authority could have made it. The circular logic in the WUT that courts can interfere when an action of the legislature or executive is unreasonable and unreasonable action/decision is the one which no reasonable authority will make is delightfully vague. Lester and Jowell argue that reiterating

¹⁶*Associated Provincial Picture Houses Ltd v Wednesbury Corp* (1948) 1 KB 223, 230.

¹⁷*Ibid.*

¹⁸*Ibid.*

¹⁹Lord Green's proposition has been endorsed by the SCOB in *Bangladesh Soya-Protein Project Ltd. v Secretary, Ministry of Disaster Management and Relief, Bangladesh Secretariat, Dhaka* (2001) LEX/BDHC/0184/2001.

the same word ‘reasonable’ again and again is not adequate and intellectual honesty of the judges would require further explanation about the reason of considering an action unreasonable.²⁰

The secrecy and veil of the judiciary, that is the lack of transparency, in a test only creates murmurs of prejudice and encroachment of policy sphere. Suppressing reason behind the cloak of WUT will only manifestly portray the unsuitability of the test to review legislative and/or executive action. It also pinpoints that ‘the definition of unreasonableness is nothing but tautology’.²¹ Thus there remains further questions about the contents of a truly unreasonable action which no reasonable person would have done. In addition, despite being a very straightforward and easy-going test, a closer look at the WUT reveals that there is absence of objectivity and much reliance on the subjective judgment of the judges as different judges may have varying moral values and political ideology.

11.3.2 *The Proportionality Test (PT)*

The PT was first established in Germany to protect the individual rights of citizens from the government.²² This test insists the LMAs to choose the least restrictive measure against the fundamental rights of the citizens to serve its legitimate purpose. Thus, the PT is a stricter test than that of the WUT and aims at securing the ‘minimum standard of means-ends relationship for the state’s activities’.²³

The PT involves a rigorous assessment of any restriction imposed on a constitutional right to justify such interference. Despite different formulations of the PT,²⁴ this chapter relies on the most widely followed Alexy’s proposition of the test involving four tiers of tests.²⁵ First, the restrictions imposed must pursue a legitimate purpose. Second, the rational connection between the pursued purpose and the action taken should be present. Third, the action taken, or law made must be

²⁰ Anthony Lester and Jeffrey Jowell, ‘Beyond Wednesbury: Substantive Principles of Administrative Law’ (1988) 14(2) *Commonwealth Law Bulletin* 858–70.

²¹ *Regina v Chief Constable of Sussex ex p ITF* (1999) 1 All ER 129 [per Lord Cooke].

²² Moshe Cohen-Eliya and Iddo Porat, ‘American balancing and German proportionality: The historical origins’ (2010) 8(2) *International Journal of Constitutional Law* 263–86; Bernhard Schlink, ‘Proportionality (1)’ in Michel Rosenfeld, and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 718–737; Aharon Barak, ‘Proportionality (2)’ in Michel Rosenfeld, and András Sajó (n 23) 738–755.

²³ Hiroshi Nishihara, ‘Constitutional Meaning of the Proportionality Principle in the Face of the Surveillance State’ (2008) 26 *Waseda Bulletin of Comparative Law* 1, 3.

²⁴ For an illuminating comparison of the Canadian and German understandings, see Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383.

²⁵ Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) 66; also see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012).

necessary in that there is no less intrusive but equally effective alternative. And finally, no disproportionate burden to the right holder can be imposed. The PT is about resolving a conflict between the right and a competing interest. In the fourth tier of the test this conflict between right and competing interest is resolved.²⁶ Kai Möller puts it as follows:

Before engaging in the balancing exercise it is important to establish that there exists a genuine conflict (suitability) between the right and a relevant (legitimate) competing interest (legitimate goal) which cannot be resolved in a less restrictive way (necessity).²⁷

The Bangladesh Constitution has pledged to establish political, economic, and social justice in the state.²⁸ From the time of Aristotle, the concept of ‘justice’ has been intertwined with the concept of proportionality.²⁹ The constitutional dream of establishing justice as pledged in the preamble sheds light on the intention of the FoC about interpretation of following provisions of the Constitution. Proportionality as an enforceable legal tool takes constitutional law closer to constitutional justice.³⁰ A signature feature of the modern society is overflowing information and resultant increased transparency. A paradigm shift in our understanding of the contemplation of the FoC as regards a legal tool like proportionality that allows consideration of diverse factors which ordinary people in the street consider reasonable would help renew the social contract of the citizens by re-establishing law’s connection with justice. Although in reality constitutional justice is often contested, the PT simplifies grounds for decision-making and makes the process transparent.³¹ The PT emphasizes on the grounds of justification for restriction and scrutinises legality, legitimacy, and normativity of legislative and executive actions. Such a mechanism allows proponents and opponents of restrictions on fundamental rights to present their claims to the legislature in justifiable terms and makes it easy for the courts to scrutinise legislation in terms that connect both to constitutional values and lived experiences.

²⁶ Denise Réaume, ‘Limitations on Constitutional Rights: The Logic of Proportionality’ University of Oxford Legal Research Paper Series, Paper No. 26/2009, 26.

²⁷ Kai Möller, ‘Proportionality: Challenging the critics’ (2012) 10 *International Journal of Constitutional Law* 709.

²⁸ The Constitution of Bangladesh, Preamble.

²⁹ For details on proportionality and distributive justice, see Sarah Broadie and Christopher Rowe (translated), *Aristotle: Nicomachean Ethics (Translation, Introduction, Commentary)* (Oxford University Press 2002) 162–63; Eric Engle, ‘The General Principle of Proportionality and Aristotle’ in Huppes-Cluysenaer L. and Coelho N. (eds), *Aristotle and The Philosophy of Law: Theory, Practice and Justice* (Springer 2013) (“Aristotle’s ideas of justice as ratio and virtue as the means explain the application of ... proportionality to distributive justice—respectively, social justice (proportional shares in the constitution of the Polis, i.e. the State) on the one hand and proportional punishment of crimes on the other”).

³⁰ Vicki C Jackson, ‘Constitutional Law in an Age of Proportionality’ (2015) 124 *Yale Law Journal* 3096.

³¹ See generally Vicki C. Jackson & Mark Tushnet (eds), *Comparative Constitutional Law* (Routledge 2020).

11.3.3 *Distinction Between WUT and PT*

The WUT does not arrive at a decision and resultant action that is reasonable on its merit, rather it backs a decision that is not unreasonable *per se*. It is ancient, delightfully vague, and lacks substantive content. In contrast, through the PT, the SCOB can reach a positively reasonable decision weighing the equal alternatives at hand. There is absolutely no need for the modern society to rely on a backdated negative concept to provide protection to fundamental rights, unless the Constitution itself provides for such a lowering standard of protection to some fundamental rights. The PT ensures that the LMAs are not using a sledgehammer to crack a nut. It only asks that there should be a reasonable relationship between a legitimate objective and the measure taken to that end while considering the diverse other factors involved and alternatives at hand.

The idea that results in WUT and PT do not actually vary was an academic hypothesis required to be tested for long. The idea was tested for the first time when the European Court of Human Rights (ECtHR) ran a PT and decided that under Article 8 of the European Convention on Human Rights, the inquiry and subsequent discharge of personnel from the Royal Navy on the grounds that they were homosexuals was a violation of their right to a private life.³² However, earlier in the same case, the UK court found no breach of any right on such restriction by going through the WUT. The UK court was of the view that it is unreasonable to admit gay personnel to the military because that would meddle with military morale and allegedly affect the operational effectiveness of the armed forces. On the other hand, the ECtHR was of the view that such a claim about operational effectiveness must be backed by substantial reasoning and the measure taken must be proportionate. This incident highlighted the difference between two tests and shows the differing tests have different value mechanism and can reach different outcomes.

In conclusion, the PT necessitates a more thorough examination of the appropriateness of an action, with the court playing a key role in determining whether the action performed is excessive in relation to the power provided.³³ In contrast, in the exercise of WUT, the court defers to the judgment of the LMAs and intervenes only when the judgment is so out of comparison against the mischief sought to be curbed that it is beyond the contemplation of any reasonable human being.³⁴

³² *Smith and Grady v UK* (1999) 29 EHRR 493.

³³ Mahmudul Islam (n 14) 712.

³⁴ *Ibid*.

11.4 The Approach of the SCOB

The current test for reasonableness in Bangladesh is that an action cannot be unreasonable like the one in the *Wednesbury Unreasonable* case.³⁵ An action cannot be so unreasonable that no human being acting reasonably could have taken it. The SCOB is uniformly declining to apply any of the tests discussed above. Occasionally it prefers to adjudge the objective of the action taken and at times it does not. It is also reluctant to see the difference in architecture of all Types 1, 2, and 3 fundamental rights. However, the SCOB indeed in one case showed indication that in case of Type 2 fundamental rights, the court might be interested in exploring the PT in assessing the reasonableness of a decision affecting fundamental rights.

11.4.1 Type 1 Fundamental Rights

In *A.Y.M. Akramul Hoque v Government of the People's Republic of Bangladesh and Ors.*,³⁶ the HCD engaged with the WUT in adjudicating the reasonableness in a decision affecting articles 27 and 31 of the Constitution- Type 1 fundamental rights. Here AYM Akramul Hoque challenged an executive decision that allowed the promotion of a junior officer superseding him for the promotion. The court led by Justice Moyeenul Islam Chowdhury observed that the Superior Selection Board failed to apply the equality clause to the petitioner in the matter of promotion to the next higher post. In addition, he was not dealt with in accordance with law as per article 31 of the Constitution. The court held that such decision contravened articles 27 and 31 of the Constitution with respect to the promotion of the petitioner.

Although there is no scope of restriction in Type 1 fundamental rights and absolute protection is given to citizens' right to equality, reasonable classification can be made. In doing so, the court can assess the reasonability of a law or executive decision. This is where the court applied the WUT in *AYM Akramul Haque*. Here, the court assessed whether the promotion of a junior officer superseding a senior officer is manifestly unreasonable. The court did not wholeheartedly engage with the question of reasonability of the action but just wanted to make sure it is not manifestly unreasonable. Thus, the court could avoid the question of merit and did not take into consideration other factors that were in play in reaching the decision the selection board took.

³⁵ *Associate Provincial Picture House Ltd. v Wednesbury Corporation* (1948) 1 KB 223; *Unique Hotel & Resorts Ltd v Bangladesh* (2010) 15 BLC 770.

³⁶ *A.Y.M. Akramul Hoque v Government of the People's Republic of Bangladesh and Ors.* (2018) LEX/BDHC/0263/2018 [*AYM Akramul Haque*, hereinafter].

11.4.2 Type 2 Fundamental Rights

Quite surprisingly in a country the citizen of which had to face tumultuous violation of civil and political rights in the past, there has not been many reported judicial decisions that dealt with ‘reasonableness’ of a restriction on rights like freedom of movement, assembly, association, speech, privacy. The only authentic commentary on the Constitution of Bangladesh³⁷ so far is of the view that these rights are to be strictly scrutinised. In essence, Mahmudul Islam advocates for the tiers of tests in the PT although he avoids the phraseology perhaps due to the express decline of the SCOB to take resort to the PT in *Ekushey Television*.³⁸

In *AM Shamsuddin and others v Government of Bangladesh*,³⁹ the High Court Division (HCD) looked at the objective of the legislation and evaluated whether the objective was accomplished with the act. Here AM Shamsuddin challenged the constitutionality of the *Notebooks (Prohibition) Act 1980* on the ground that they felt their constitutional right to freedom of speech and expression has been violated. The HCD analysed the Act with its pre-enactment history and observed that the impugned Act was enacted in the interest of decency and morality. The HCD did not find any reasonable nexus with the objective of the Act and the objective pursued, that is how the ban of notebooks could uphold decency and morality in the society. In this case, the HCD utilised the first and second tier of the PT. Although it did not use the exact phraseology, its reliance on the first two tiers suggests that the SCOB might be interested to take full advantage of a transparent and fully developed judicial test in the future.

However, in another case from 2017, *Md. Tarikul Islam and Ors. vs. Government of Bangladesh and Ors.*,⁴⁰ a challenge against the constitutionality of a statutory provision was discharged on the ground that the provision passed the WUT.⁴¹ Here, the provision in question provided that the Rural Electrification Board shall not be considered as a commercial entity of the likes of a shop, commercial establishment, industry etc. By implication, the employees therein were not granted the right to register as a trade union. Justice Syed Refaat Ahmed found that this provision, in effect, restricting freedom of association, is not entirely unreasonable citing Justice DC Bhattacharya⁴² from 1974. He reasoned that the provision passed the reasonableness test because article 16 of the constitution stipulated various avenues of socio-economic transformation with the objective “progressively to remove the disparity in the standards of living between the urban and rural areas”. In this case, it may happen that both the PT and the WUT yield a similar outcome. However, it is important to see whether the court is applying a vague standard to reach a conclusion that raises major contention among a group of citizens.

³⁷ Mahmudul Islam (n 14) 327–329.

³⁸ *Ekushey Television* (n 8).

³⁹ *AM Shamsuddin and others v Government of Bangladesh* (1994) 14 BLD 418.

⁴⁰ *Md. Tarikul Islam and Ors. v Government of Bangladesh and Ors.* (2017) LEX/BDHC/0380/2017.

⁴¹ *Ibid* [para 46].

⁴² *Oali Ahad v Govt. of Bangladesh* (1974) 26 DLR 376.

11.4.3 Type 3 Fundamental Rights

In *Mostafa Kamal Sazu and Ors v Secretary, Ministry of Finance, Bangladesh Secretariat, and Ors*,⁴³ an executive notice regarding refusal to issue reference license was challenged. It was alleged that article 40 of the Constitution – a Type 3 FR was infringed by such refusal to issue the license. Here, the HCD led by Justice Nazrul Islam Talukder engaged in the WUT to assess whether the impugned notice violated article 40 of the Constitution.⁴⁴ The court observed that impugned notice by the licensing authority refusing to issue reference license could not have been done by a reasonable person. Thus, the court declared the unconstitutionality of the notice. In doing so, the court only engaged with the WUT and not the PT. The constitutional architecture permits surface level scrutiny of Type 3 fundamental rights, and the court has rightly done so.

11.5 Justifying the Borrowings of Proportionality

The unwillingness of the SCOB to transplant the PT in the place of WUT may be attributed to the separation of power concerns and troubled political history. In the first 50 years of Bangladesh, each of the three branches of government has transgressed their functions. Four amendments so far brought to the Constitution out of 17 have been held to be ultra vires. Both the Fifth Amendment Act⁴⁵ and Seventh Amendment Act⁴⁶ was invalidated and declared to be thoroughly illegal, without lawful authority. The Eighth Amendment to the Constitution was partially declared to be unconstitutional on the ground of violating the basic structure of the Constitution.⁴⁷ The Thirteenth Amendment to the Constitution relating to the establishment of the caretaker government was declared unconstitutional.⁴⁸ The Sixteenth Amendment to the Constitution relating to impeachment provision of the judges of the SCOB was declared unconstitutional as well.⁴⁹ Again, the past deeds of judiciary have not been unquestionable either. In a series of cases, the SCOB has directly and indirectly justified martial law in the country.⁵⁰ Thus, there used to be a mutual suspicion on the action of each other.

⁴³ *Mostafa Kamal Sazu and Ors v Secretary, Ministry of Finance, Bangladesh Secretariat, and Ors*. (2014) LEX/BDHC/0141/2014.

⁴⁴ *Ibid*, para 18.

⁴⁵ *Khondker Delwar Hossain v Bangladesh Italian Marble Works Ltd* (2010) 63 DLR (AD) 298.

⁴⁶ *Siddique Ahmed v Bangladesh Writ Petition No. 696/2010*.

⁴⁷ *Anwar Hossain Chowdhury v Bangladesh* (1989) BLD (Spl) 1.

⁴⁸ *Abdul Mannan Khan v Bangladesh* Civil Appeal No. 139 of 2005 with Civil Petition for Leave to Appeal No.596 of 2005.

⁴⁹ *Advocate Asaduzzaman Siddiqui v Bangladesh* (AD) Civil Appeal No.06 of 2017.

⁵⁰ See for example, *Sultan Ahmed v Chief Election Commissioner* (1978) 30 DLR 291; *Haji Jaynal Abedin v Bangladesh* (1980) 30 DLR 71; *Jamil Haque v Bangladesh* (1982) 34 DLR (AD) 125; *Nasiruddin v Bangladesh* (1980) 32 DLR (AD) 216; *Khandakar Mostaque Ahmed v Bangladesh* (1982) 34 DLR (AD) 222; *Khandakar Ehtesamuddin Ahmed v Bangladesh* (1978) 30 DLR (AD) 154.

Given the situation, it is important to adopt the PT as the governing test for assessing reasonableness; but in reality the courts shied away from the question in the fear regular intervention in the decision of the LMAs will only question the legitimacy of the judicial decisions. In this fear, the courts were not willing to engage with question that significantly, if not harm, threaten fundamental rights of citizens. Although such a situation has changed over the time, the SCOB has not got the chance to actually revisit their approach. Because the issue of reasonableness has mostly been litigated in administrative matters and only in rare occasions statutory provisions have had to face judicial scrutiny for the curtailment of fundamental rights.⁵¹

There are at the least four reasons for which the SCOB should quickly move to adopt the PT as the major test for assessing the restrictions on Type 2 FRs. First, the FoC framed Type 1 FRs and Type 2 FRs in a way to give them increased protection over Type 3 FRs. The PT evidently offers a transparent and structured framework for assessment than its counterpart WUT.⁵² In addition, the WUT is not adequate in Type 2 FRs because it is simply not enough for a policy decision, or legislative provision to be negatively unreasonable, rather governance, policy decisions, legislative provisions should be taken on substantive grounds.

Second, the PT is context specific variable intensity review and thus efficient enough to replace the WUT across a variety of contexts. This is what led Lord Cooke to say the followings:

I think that the day will come when it will be more widely recognised that Wednesbury was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.⁵³

Third, the legitimacy of constitutional democracies is dependent on accountability to ‘we the people’. This includes but is not limited to majoritarian consent. Elections are one form of accountability control machine but ensuring that the government’s actions are justified and proportionate (whether legislative or executive) helps preserve and promote accountability throughout time.⁵⁴ Finally, the Constitution of

⁵¹ Md Rizwanul Islam, ‘Reasonableness as Proportionality: More Intrusive Scrutiny in Civil-Political Matters than Socio-Economic Ones?’ in Po Jen Yap (eds), *Proportionality in Asia* (Cambridge University Press 2020) 174.

⁵² Iryna Ponomarenko, ‘Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law’ (2016) 21 Appeal 125; Paul Daly, ‘Wednesbury and Proportionality — Where are We Now?’ (*Administrative Law Matters*, 28 November 2016) <<https://www.administrativelawmatters.com/blog/2016/11/28/wednesbury-and-proportionality-where-are-we-now/>> accessed 16 August 2022.

⁵³ *R (Daly) v Secretary of State for the Home Department* (2001) UKHL 26, 49.

⁵⁴ Aharon Barak, *Proportionality: Constitutional Rights and Limitations* (Cambridge University Press 2012) 472–73 (arguing that limitations on rights must be properly justified to be compatible with democracy and that proportionality analysis is a “meaningful” way of doing so).

Bangladesh is committed to political, economic, and social justice for its citizens. It requires equal and considerate attention for the protection of rights of all citizens. The requirement of a reasoned justification for the curtailment of Type 2 FRs of citizens pays the due respect for the Constitution.⁵⁵

11.6 Conclusion

It is surprising to see that over the last 50 years, the SCOB has overlooked the architectural difference in the design of constitutional rights between ‘any restriction’ and ‘reasonable restriction’. In doing so, the intention of the FoC has not been considered. This chapter has argued that the presence of ‘reasonable’ and absence of ‘reasonable’ before the term ‘restriction’ in fundamental rights in the Bangladesh Constitution matters, it means something. The FoC deliberately used and omitted the word. The use of ‘reasonable’ before ‘restriction’ in some fundamental rights (Type 2) is an indication for the SCOB to assess that the imposed restrictions are reasonable on its merit. The constitutional dream of establishing political, economic and social justice is furthered by the use of such distinctive tests for different types of fundamental rights. This chapter has showed the different standards of review to be pursued by the SCOB in adjudicating restrictions on fundamental rights. It has articulated the reasons why the SCOB should apply the PT in assessing the restrictions affecting Type 2 fundamental rights. The SCOB should ensure any restriction on these Type 2 is on its merit proportionate and pass the PT to be held constitutional. In case of Type 3 FRs, the traditional WUT needs to be applied because the FoC contemplated a lower level of judicial scrutiny for them.

References

Books

- Alexy, Robert. 2002. *A Theory of Constitutional Rights*. Oxford: OUP.
- Barak, Aharon. 2012. *Proportionality: Constitutional Rights and Limitations*. Cambridge: Cambridge University Press.
- Broadie, Sarah and Christopher Rowe. 2002. (translated), *Aristotle: Nicomachean Ethics (Translation, Introduction, Commentary)*. Oxford: OUP.
- Cohen-Eliya, Moshe, and Iddo Porat. 2013. *Proportionality and Constitutional Culture*. Cambridge: Cambridge University Press.
- Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*, 365. Dhaka: Mullick Brothers.
- Jackson, Vicki C., and Mark Tushnet, eds. 2020. *Comparative Constitutional Law*. Routledge.

⁵⁵ See for details, Rainer Forst, ‘The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach’ (2010) 120(4) *Ethics* 711–40.

- Munim, F.K.M.A. 1975. *Rights of the citizens under the constitution and law*, 287. Dhaka: Bangladesh Institute of Law and International Affairs.
- Neto, Joao Andrade. 2018. *Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil*. Springer.

Chapters in Edited Books

- Islam, Md Rizwanul. 2020. Reasonableness as Proportionality: More Intrusive Scrutiny in Civil-Political Matters than Socio-Economic Ones? In *Proportionality in Asia*, ed. Po Jen Yap, 174. Cambridge: Cambridge University Press.
- Schlink, Bernhard. 2012. Proportionality (1). In *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó, 718–737. Oxford: OUP.

Articles

- Bernal-Pulido, Carlos. 2013. The Migration of Proportionality Across Europe. *New Zealand Journal of Public & International Law* 11: 483.
- Bhagwat, Ashutosh. 1997. Purpose Scrutiny in Constitutional Analysis. *California Law Review* 85: 297.
- Cohen-Eliya, Moshe, and Iddo Porat. 2010. American Balancing and German Proportionality: The Historical Origins. *International Journal of Constitutional Law* 8 (2): 263–286.
- Forst, Rainer. 2010. The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach. *Ethics* 120 (4): 711–740.
- Grimm, Dieter. 2007. Proportionality in Canadian and German Constitutional Jurisprudence. *University of Toronto Law Journal* 57: 383.
- Haque, Muhammad Ekramul. 2006. Protecting Fundamental Rights Through Restricted Legislative Competence: Application of the Doctrine of Eclipse and Severability. *Dhaka University Law Journal* 17 (1): 49–62.
- . 2012. Does Part II of the Constitution of Bangladesh Contain Only Economic and Social Rights? *Dhaka University Law Journal* 23 (1): 45–51.
- Jackson, Vicki C. 2015. Constitutional Law in an Age of Proportionality. *Yale Law Journal* 124: 3096.
- Kelso, R. Randall. 2021. Justifying the Supreme Court's Standard of Review. *St. Mary's Law Journal* 52 (4): 973.
- Lester, Anthony, and Jeffrey Jowell. 1988. Beyond Wednesbury: Substantive Principles of Administrative Law. *Commonwealth Law Bulletin* 14 (2): 858–870.
- Möller, Kai. 2012. Proportionality: Challenging the Critics. *International Journal of Constitutional Law* 10: 709.
- Nishihara, Hiroshi. 2008. Constitutional Meaning of the Proportionality Principle in the Face of the Surveillance State. *Waseda Bulletin of Comparative Law* 26: 1.
- Parsons, Simon. 2020. Wednesbury Unreasonableness: Alive & Kicking? *New Law Journal* 7874: 18.
- Peiris, G.L. 1987. Wednesbury Unreasonableness: The Expanding Canvas. *The Cambridge Law Journal* 46 (1): 53–82.
- Pettinga, Gayle Lynn. 1987. Rational Basis with Bite: Intermediate Scrutiny by Any Other Name. *Indiana Law Journal* 62 (3): 779.
- Ponomarenko, Iryna. 2016. Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law. *Appeal* 21: 125.

- Shaman, Jeffrey M., ed. 1984. Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny. *Ohio State Law Journal* 45: 160.
- Sweet, Alec Stone, and Jud Mathews. 2008. Proportionality Balancing and Global Constitutionalism. *Columbia Journal of Transnational Law* 47: 72.

Documents

- Gupta, Suranjit Sen, Kawser Ahmed 2021. *Proceedings of the Constituent Assembly of Bangladesh: Debates on the Making of the Constitution* (Pencil Publications, Dhaka.).
- Réaume, Denise 2009. Limitations on Constitutional Rights: The Logic of Proportionality. University of Oxford Legal Research Paper Series, Paper No. 26.

Internet Source

- Daly, Paul. 2016. Wednesbury and Proportionality — Where are We Now? (*Administrative Law Matters*, November 28). <https://www.administrativelawmatters.com/blog/2016/11/28/wednesbury-and-proportionality-where-are-we-now/>. Accessed 16 Aug 2022.

Azhar Uddin Bhuiyan is a Lecturer at the Department of Law, University of Dhaka, Bangladesh. He obtained his LLB and LLM from the University of Dhaka. He has completed a second Master of Law at the Faculty of Law, University of Cambridge, UK with Chevening-Cambridge Trust Scholarship. He is a life member at the oldest debating society of the world, The Cambridge Union as a Silver Street Scholar, and the Blogs Editor of Cambridge International Law Journal.

Chapter 12

Protection Through Constitutional Guarantees: The Case of Women, Children, and Backward Sections of the People



Borhan Uddin Khan and Md Al Ifran Hossain Mollah

Abstract The Bangladesh story of constitutional guarantees towards fundamental rights protection is riddled with socio-political turbulences marked by *coup d'état*, shadow authoritarianism, and executive's unchecked deference within the democratic system of governance. Despite initial setbacks, Bangladesh has successfully managed to maintain a slow, yet sustained trend of elevation when it comes to the effective realisation of rights guaranteed under the constitutional architecture. Its Constitution recognises different categories of rights within the purview of the Fundamental Principles of State Policy and Fundamental Rights. The twin principle of equality and non-discrimination have been assertively enumerated under articles 27 and 28 of the Constitution which requires the State not to discriminate against any citizen on grounds only of religion, race, caste, sex, or place of birth. The Constitution also affords special protection to women, children, and 'backward sections' of the people. The term 'backward sections' has not been defined but left to the judicial construction by the Supreme Court of Bangladesh holding differentiated yet exclusive right to enforce and interpret constitutional provisions. Consequently, the constitutional journey towards upholding and protecting the rights of women, children, and 'backward sections' of the people is intrinsically intertwined with the intervention of the higher judiciary. This approach has also turned the 'backward sections' of the people as an undertheorised concept. This chapter explores the constitutional trend, development and challenges relating to the effective realisation of rights for women, children and 'backward sections' of the people in Bangladesh.

B. U. Khan

Department of Law, University of Dhaka, Dhaka, Bangladesh
e-mail: borhan@du.ac.bd

Md Al Ifran Hossain Mollah (✉)

Department of Law, Independent University, Dhaka, Bangladesh
e-mail: ifran@iub.edu.bd

Keywords Constitutional guarantees · Protection · Children · Women · Backward sections of the people · State policies · Non-discrimination · Judicial construction · Development · Challenges

12.1 Introduction

The emergence of Bangladesh as an independent state through a series of revolutionary political struggles marks the parallel history of its transition from feudalism to free market capitalism. This transition attempted to heal the brunt of normative social inequalities, colonial exploitation, and a short-lived courtship between two different territories. Since patriarchal legal traditions were spearheaded through the patronage of religion and have been running deep within its social architecture, Bangladesh soon found itself in a socio-political impasse in terms of rights realisation. The history of post-independence Bangladesh, within the realities of multiple frontiers, is the history of its continuing struggle towards achieving social equilibrium.¹ Consequently, the Bangladesh story of constitutional guarantees towards fundamental rights protection is riddled with socio-political turbulence marked by coup d'état, shadow authoritarianism, and the executive's unchecked deference within the democratic system of governance.

Bearing the high ideals of egalitarian philosophy, the Constitution of the People's Republic of Bangladesh (hereinafter Bangladesh Constitution or the Constitution) has pledged to a society free from exploitation where the rule of law, fundamental human rights and freedom, equality, and justice shall prevail above and over all things.² Consequently, the twin principles of equality and non-discrimination, being the primer of the International Bill of Rights, have found their way into the form of a constitutional guarantee in Bangladesh.³ Article 27 of the Constitution has articulated formal equality which is premised on the Aristotelian proposition of 'arithmetic equality' or 'equality of difference', that is things that are alike should be treated alike.⁴ Since formal equality has no substantive content of its own and requires comparison, this form of equality confuses far more than it clarifies.⁵ It has been contended that the idea of equality envisaged under article 27 is not absolute in nature, but rather subject to 'intelligible differentia'.⁶ Moreover, the equal

¹ Willem Van Schendel, *A History of Bangladesh* (Cambridge University Press 2009) 24.

² The Constitution of the People's Republic of Bangladesh (adopted 4 November 1972, entered into force 16 December 1972), preamble.

³ Muhammad Ekramul Haque, 'The Bangladesh Constitutional Framework and Human Rights' (2011) 22(1) *Dhaka University Law Journal* 55, 70.

⁴ Charles M Young, 'Aristotle's Justice', in Richard Kraut (eds), *The Blackwell Guide to Aristotle's Nicomachean Ethics*, (Blackwell Publishing 2006) 186.

⁵ Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537, 579.

⁶ *Sheikh Abdus Sabur v. Returning Officer, District Education Officer-in-charge, Gopalgong*, 41 DLR (AD) 30.

protection clause does not prevent the government from resorting to classification for the purpose of legislation.⁷

In addition to the prohibition of differential treatment on the ground of race, caste, sex, religion, or place of birth, the Constitution has also facilitated equality of opportunity for all citizens.⁸ However, in the absence of objective legislative and judicial standards of measures, it remains ambiguous whether the promotion of equality of opportunity is a narrow procedural obligation or a wider substantive one.⁹ Consequently, an improvised conception of substantive equality, through settling its roots in existing understanding, underscores a four-dimensional approach: to redress disadvantage; to address stigma, stereotyping, prejudice, and violence; to enhance voice and participation; and to accommodate difference and achieve structural change.¹⁰ Substantive equality has also found its resonance within the work of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee, which has particularly deliberated on temporary special measures as a strategy for overcoming underrepresentation of women and redistribution of resources between men and women.¹¹ Through taking into consideration the multifaceted dimension of inequality, the Constitution has facilitated positive discrimination, particularly for the welfare of women, children, and any backward section of citizens.¹² Positive discrimination measures, based on the form they take, can be referred to as ‘quotas’, ‘reservations’, ‘preferential treatment’, ‘diversity programs’ and so on.¹³

Bangladesh has achieved praiseworthy success in terms of realising women’s and children’s rights guaranteed under its Constitution. However, the Constitution has neither defined nor provided any specific legislation setting out objective standards for locating ‘backward sections of citizens’ within its sovereign boundaries. The policies aimed at accommodating ‘backward sections of the people’ have been left much to the discretion of the executive authorities. Moreover, there is a dearth of literature and judicial decisions identifying this group. Owing to its variable nature, the authors argue that the term ‘backward section of the people’ in the context of the Bangladesh Constitution is not only undertheorised but has been hardly theorised. Furthermore, the long-cherished social metamorphosis aimed at constructing a rights sensitive society has frequently stumbled due to socio-political

⁷ Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brother, Dhaka 2019) 149–150.

⁸ Bangladesh Constitution (n 2) arts 19, 28(1), and 29(1).

⁹ Catherine Barnard and Bob Hepple, ‘Substantive Equality’ (2000) 59(3) *The Cambridge Law Journal* 562, 566.

¹⁰ Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712, 727.

¹¹ The CEDAW Committee, General Recommendation No. 25: On Temporary Special Measures (2004)

CEDAW/C/GC/25, para 8.

¹² Bangladesh Constitution (n 2) arts 14, 28(4), and 29(3).

¹³ Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 68.

turbulence marked by coup d'état, shadow authoritarianism, religious extremism, and executives' unfettered interferences within the democratic system of governance.

In this backdrop, this chapter aims at exploring the constitutional trends, developments, challenges, and issues from both an inbound and comparative context, towards the effective realisation of the rights of women, children, and 'backward sections of the people' in Bangladesh 50 years after the adoption of the Constitution.

12.2 Women's Rights Through Vernacular: A Tale of Success, Struggle, and Compromise

Since its emergence, Bangladesh has attained significant success in gender equality through catching up or even surpassing its neighboring comparators on different perimeters of gender equality.¹⁴ In a relatively short period, Bangladesh has been successful in reducing maternal mortality, expanding roles for women in politics, and significantly closing the gender gap in school enrolment at the primary and secondary levels.¹⁵ Bangladesh has since closed 71.9% of its overall gender gap and ranks 65th in the global index.¹⁶ This horizontal trend of development resonates with the constitutional pledge of pursuing equality of opportunity and participation, the elimination of gender identity-based discrimination, as well as equal rights with men.¹⁷

In addition to the International Bill of Rights, Bangladesh has been a party to the CEDAW since 1984 and has ratified the Optional Protocol in 2001, which establishes complaint and inquiry mechanisms subject to the exhaustion of domestic remedies. Bangladesh has also formulated a National Women Development Policy (NWDP) in 2011 with a longlist of goals aimed at creating an egalitarian society where men and women will enjoy all fundamental human rights on an equal basis.¹⁸ However, the NWDP of 2011 is a straight breakaway from the NWDP of 2008 (now scrapped), which unequivocally declared equal property rights for women as well as a 40% quota for women in the government's judicial, legislative, and executive branches, including the local government agencies. Nevertheless, Bangladesh still follows customised personal laws for different religious groups in adjudicating family

¹⁴ Naomi Hossain, 'The SDGs and the Empowerment of Bangladesh Women' in Sachin Chaturvedi et al. (eds) *The Palgrave Handbook of Development Cooperation for Achieving the 2030 Agenda* (Palgrave Macmillan 2021) 456.

¹⁵ Berkley Center for Religion, Peace and World Affairs, *Women and Religion in Bangladesh: Obstacles and Opportunities for Empowerment* <<https://berkleycenter.georgetown.edu/publications/policy-brief-women-and-religion-in-bangladesh>> accessed 23 December 2021.

¹⁶ World Economic Forum, *Global Gender Gap Report 2021*, 35.

¹⁷ Bangladesh Constitution (n 2) arts 19(3) and 28(2).

¹⁸ Ministry of Women and Children Affairs, Bangladesh (MoWCA), *National Women Development Policy, 2011*, 13.

matters before its courts of law. As a result, Bangladesh has consistently expressed reservations to CEDAW articles 2 and 16.1(c) on the grounds that they violate 'Sharia law based on Holy Quran and Sunna'.¹⁹

However, the higher judiciary of Bangladesh has started to develop a consistent pattern of jurisprudence to address and enforce its constitutional commitments relating to gender justice in consonance with international human rights obligations. Through providing progressive judgments in custody, maintenance, sexual harassment, and religious malpractices, judges have started to take a liberal stance on the constitutional protection of women's rights.²⁰ In a recent judgment, the High Court Division (HCD) of the Supreme Court of Bangladesh directed to use the word 'unmarried' instead of 'virgin' under the Column 5 of Bangladesh Standard Form Number 1600 and 1601 to denote the previous marital history of the bride.²¹ The abuse of *fatwa* (non-binding legal opinion delivered by competent Islamic jurist) for the imposition of humiliating forms of punishment (whipping, lashing, beating, forcibly cutting hair, ostracising from social affairs, etc.) against women and girl child was brought to the notice of the HCD by a group of rights activist NGOs.²² Referring to articles 35(1) and 35(5) of the Constitution, the HCD unequivocally declared a ban over the issuing of *fatwa* and opined that the imposition and execution of extra-judicial penalties, including those in the name of execution of *fatwa* is bereft of any legal pedigree and has no sanction in the laws of the land.²³ This position was reiterated subsequently by the Appellate Division (AD) of the Supreme Court of Bangladesh, albeit with a rapprochement to the blanket ban on *fatwa*, where the court held that *fatwa* can be issued by competent persons only on religious matters subject to voluntary acceptance and that any form of coercion or undue influence in any form is strictly forbidden.²⁴ The Supreme Court of India has also declared *fatwa* to be an advice or opinion that can neither be legally enforced nor made binding on any person since it stands in contravention to the very core spirits of the Indian constitution.²⁵

In a parallel context, the issue of veiling has gradually been politicised globally and has become a locus of conflict between traditional and contemporary

¹⁹ UN Treaty Collection (UNTC), 'Status of Treaties', <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV8&chapter=4&clang=_en#EndDec> accessed 28 December 2021.

²⁰ Dina Mahnaz Siddiqi, 'Islam, gender and the nation: The social life of Bangladeshi fatwas' in Deana Heath and Chandana Mathur (eds) *Communalism and Globalization in South Asia and Its Diaspora* (Routledge 2011) 194.

²¹ *BLAST and others v Bangladesh and others*, Writ Petition No. 7878 of 2014.

²² Human Rights Watch, Bangladesh: *Protect Women Against Fatwa Violence*, <<https://www.hrw.org/news/2011/07/06/bangladesh-protect-women-against-fatwa-violence>> accessed 28 December 2021.

²³ *Bangladesh Legal Aid and Services Trust and Others v. Government of Bangladesh and Others*, Writ Petition No.5863 of 2009, 39 CLC (HCD) 2010.

²⁴ *Mohammad Tayeeb, Moulana Abul Kalam Azad v. Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Religious Affairs and others* Civil Appeal No. 593 and 594 of 2001, AD Judgment of 12 May 2011, 85.

²⁵ *Vishwa Lochan Madan v. Union of India*, AIR 2014 SC 2957.

interpretations.²⁶ In the Forced Veiling Case, the HCD, while referring to articles 27, 31, 32 and 39 of the Constitution along with Rule 27A of the Government Servants (Discipline and Conduct) Rules 1979, held that forced veiling or imposition of a dress code does not only violate women's constitutional rights but also constitutes sexual harassment under the Guidelines on Prevention of Sexual Harassment.²⁷ The HCD has recently prohibited the application of the colonial era 'two-finger test' which shaped the discourse of rape trials, including the humiliating treatment of rape survivors before the legal system for centuries.²⁸ The joint bench of the HCD stated that the two-finger test violates the physical and mental dignity of women and has no evidential value or scientific merit.²⁹ Earlier, the Supreme Court of India, through making incidental reference to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, had also banned the two-finger test for the reason that such a test violates the right to privacy of women and girl children.³⁰ The same trail has been followed by the Supreme Court of Pakistan, which declared the two-finger test as unconstitutional and held that dragging the sexual history of the rape survivor into the case is an affront to the reputation and honor of the rape survivor.³¹

In spite of the growing trend of women's participation in economically productive work, discrimination and underrepresentation within executive power rubrics persist mostly due to gender insensitive recruitment policies.³² This issue was first addressed at the national level through equalising the age of retirement for the position of flight attendant in Bangladesh Biman Airlines, where the HCD held that the Biman Corporation Employees Service Regulation, 1979 (Amended Regulation no.11) stands in clear violation of article 28 of the Bangladesh Constitution.³³ In another case relating to gender discrimination in public employment, the HCD held that the requirement of submitting an attested copy of marriage certificate for the post of Health Assistant by the Directorate of Health is discriminatory and violative of articles 27, 28, 29, and 31 read with articles 10 and 19 of the Constitution.³⁴ However, the gender parochial approach rooted within the social architecture has overshadowed

²⁶ Aisha Lee Fox Shaheed, 'Dress Codes and Modes: How Islamic is the Veil?' in Jennifer Heath (eds) *The Veil: Women Writers on its History, Lore and Politics* (University of California Press 2008) 294.

²⁷ *Advocate Salahuddin Dolon v. Bangladesh*, Writ Petition No. 4495 of 2009, 63 DLR (HCD) 80.

²⁸ Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press 2017) 42.

²⁹ *Bangladesh Legal Aid and Services Trust and Others v. Bangladesh and Others*, Writ Petition No. 10663/2013.

³⁰ *Lillu Alias Rajesh and Others v. State of Haryana* (2013) 14 SCC 643.

³¹ *Atif Zareef v. The State*, Criminal Appeal No.251/2020, decided on 04-01-2021.

³² Afroza Begum, 'Equality of Employment in Bangladesh: A Search for the Substantive Approach to Meet the Exceptional Experience of Women in the Contemporary Workplace' (2005) 47(3) *Journal of the Indian Law Institute* 326, 332.

³³ *Dalia Parveen v. Bangladesh Biman Corporation* (1996) 48 DLR (HCD) 132.

³⁴ *Mosammat Nasrin Akhter and others v. Bangladesh*, Writ Petition No. 6309 of 2003.

the constitutional development of women's rights in the last few decades. For instance, the contribution of unpaid work (household chores, care, and agricultural works) of women towards the economy which takes a fair share of the GDP, has been left unrecognised.³⁵

According to the Women, Peace and Security Index of 2021, Bangladesh has been ranked in the 152nd position among 170 countries at the global level.³⁶ Despite repeated constitutional promises to ensure gender justice, gender-based violence has been on a steep rise for the last couple of years. Moreover, intersectional aspects of gender disparity based on certain identity denominators like race, caste, religion, ethnicity, and sexual orientation need to be addressed in the local context. Intersectionality can be an effective tool not only for understanding the maladies of discrimination laws but also for curbing down structural inequality, including the mitigation of tension between identity politics and institutional biasness, blocking the path towards building a rights-sensitive society.³⁷

12.3 Children's Rights in the Constitution: Towards a Progressive Direction

The Constitution of Bangladesh, both in the forms of fundamental principles of state policy and fundamental rights, has guaranteed the rights of children, because they constitute of Bangladesh's population. The fundamental principles of state policy of the Constitution, which are invariably non-justiciable in nature, stipulate the guarantee of the basic necessities of life, free and compulsory education, and conformity with international laws for children.³⁸ Part III of the Constitution has articulated the fundamental rights of children, which include formal equality, non-discrimination, and the right to protection of the law including special measures.³⁹ With a view to fulfilling the constitutional commitments and guarantees relating to the protection of children's rights, the Children Act of 1974 was enacted followed by the Children Rules of 1976. In a recent judgment, it was observed that 'the Children Act, 1974 was promulgated as a direct manifestation of Article 28(4) of the Constitution, which has been placed in Part III under the title 'Fundamental Rights', and at the same time, with a view to fulfilling the mandate of the relevant international instruments of the United Nations.⁴⁰

³⁵Centre for Policy Dialogue, *Estimating Unpaid Work in Bangladesh's GDP: A Conceptual Framework for Household Satellite Accounts Approach*, CPD Policy Brief 2020 (4).

³⁶Georgetown Institute for Women, Peace and Security and Peace Research Institute of Oslo, *Tracking sustainable peace through inclusion, justice, and security for women* (2021–22).

³⁷Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43(6) *Stanford Law Review* 1241, 1298–1299.

³⁸Bangladesh Constitution (n 2) arts 15, 17 and 25(1).

³⁹*ibid.*, arts 27, 28, 31 and 32.

⁴⁰*Bangladesh v. Md Roushan Mondal alias Hashem*, (Death Reference No. 05 of 2004), 59 DLR 72.

However, the Children Act of 2013, was enacted to repeal the Act of 1974, with a view to standardising Bangladesh's national legislation on par with international obligations based on the United Nations Convention on the Rights of the Child (UNCRC).⁴¹ It is pertinent to mention that Bangladesh has been a party to the UNCRC since 1990, albeit with a reservation to articles 14(1) and 21, which consequently facilitates an upper hand in religious identity-based politics.⁴² Bangladesh has taken into account the changing landscape of the rights regime and the recommendations made by the UN Committee on the Rights of the Child by adopting the National Children Policy, 2011.⁴³ This policy framework, even though directive in nature, aims at locating intervention areas for the protection of children's rights and children's healthy development in all respects.⁴⁴

The constitutional guarantees and relevant legislative initiatives for ensuring children's rights have experienced a progressive interpretation due to the intervention of the higher judiciary. In 2003, the HCD, through a *suo moto* order, issued 7-point directives for standardising the juvenile justice mechanism in Bangladesh.⁴⁵ In the same string of events, the HCD ordered, in pursuance of article 31 of the Constitution and other relevant statutory provisions, the concerned authorities to transfer juveniles from jails to correctional homes.⁴⁶ In another case relating to the violence against child domestic workers, the HCD ordered the concerned authorities to comply with their statutory and constitutional obligations in pursuance of articles 27, 31, 32, 34, and 35 with a view to investigating, prosecuting and punishing those responsible for the torture of a child domestic worker named Hasina.⁴⁷ Since child domestic workers are employed mostly by those who are financially privileged and, to a certain extent, stand in a social position close to power rubrics, constitutional commitments to enforce their rights hardly see the light of reality, despite the increasing instances of physical and sexual abuses.

The issue of corporal punishment is pervasive throughout the country, irrespective of social and economic differences.⁴⁸ In the name of disciplining students, corporal punishment in the educational institutions of Bangladesh had been a common scenario till the government put a blanket ban on this practice in 2010.⁴⁹ The executive

⁴¹ The Children Act (Act No. XXIV of 2013), preamble <<http://bdlaws.minlaw.gov.bd/act-1119.html>> accessed 15 January 2022.

⁴² UN Treaty Collection (UNTC), 'Status of Treaties', <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtidsg_no=IV-11&chapter=4&clang=_en#EndDec> accessed 15 January 2022.

⁴³ Ministry of Children and Women Affairs, *National Children Policy* (2011) 3.

⁴⁴ Andrea Schapper, *From the Global to the Local: How International Rights Reach Bangladesh's Children* (Routledge 2014) 69.

⁴⁵ *BLAST and ASK vs. Bangladesh and others*, *Suo Moto Order No. 248 of 2003*; 11 BLT (HCD) (2003) 281.

⁴⁶ *ASK and BLAST v. Bangladesh and others*, *Writ Petition No. 6373 of 2007*.

⁴⁷ *BLAST v. Bangladesh and others*, *Writ Petition No. 3139 of 2011*.

⁴⁸ Justice M Imman Ali, *Towards a Justice Delivery System for Children in Bangladesh: A Guide and Case Law on Children in Conflict with the Law* (UNICEF Bangladesh 2010) 9.

⁴⁹ Matthew Pate and Laurie A. Gould, *Corporal Punishment around the World* (Praeger 2012) 84.

order imposing the ban was done at the instance of the HCD, which further held that corporal punishment of children must be prohibited in all settings, including schools, homes, and work places, as such practice violates the guarantees made under articles 28 and 35(5) of the Constitution.⁵⁰ In another case relating to bonded child labor in tobacco industries, the HCD directed the Ministry of Education to take the initiative to ensure compulsory education provided by statute enacted under the mandate of article 17 of the Constitution for all the children of Bangladesh becomes a realistic concept and not just lip-service.⁵¹

The dynamics of child rights discourse are complicated and unstable due to political, cultural, economic, and philosophical variables embedded within the law making process.⁵² Nevertheless, there has been a growing understanding of the vulnerabilities of children over the last few decades in Bangladesh and an increasing judicial and organisational activism to protect the rights and interests of the children.⁵³ It has been observed that though some of the recent developments may be superficial due to the insistence of western donor agencies, they indicate a significant socio-political shifting in the perception of child rights in Bangladesh and an increasing sensitivity at the policy and enforcement level.⁵⁴

12.4 Understanding Backward Sections of the People: The Discord and Discontent Within

The Constitution of Bangladesh has accommodated reasonable classification for the historically underrepresented and underprivileged groups, namely, women, children, and backward sections of the people. It has been decided earlier that the classification of persons for making law is permissible provided that such classification must have a direct nexus to the object which the classification seeks to achieve.⁵⁵ The same position has been reiterated subsequently in a case challenging the constitutional validity of indirect elections for the seats reserved exclusively for women.⁵⁶ At this juncture, it may be emphasised that Justice P.N. Bhagwati once cautiously opined that ‘the doctrine of classification should not be carried to a point where instead of

⁵⁰ *BLAST and ASK v. Bangladesh and others*, Writ Petition No. 5684 of 2010.

⁵¹ *Ain o Salish Kendra and another v. Bangladesh*, represented by the Secretary, Ministry of Labour and Manpower, and others (Writ Petition No.1234 of 2004), 63 DLR 95.

⁵² Karl Hanson and Olga Nieuwenhuys, ‘A Child-Centered Approach to Children’s Rights Law: Living Rights and Translations’ in Jonathan Todres and Shani M King (eds) *The Oxford Handbook of Children’s Rights Law* (OUP 2020) 106–107.

⁵³ Najrana Imaan, *Justice for Children in Bangladesh: An Analysis of Recent Cases* (Save the Children 2012) 1.

⁵⁴ Borhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Children in Conflict with the Law in Bangladesh* (Save the Children 2008) 41.

⁵⁵ *Bangladesh v. Md. Azizur Rahman*, 46 DLR (AD) 19.

⁵⁶ *Farida Akhter and others v. Bangladesh*, 11 MLR (AD) (2006) 237.

being a useful servant, it becomes a dangerous master'.⁵⁷ The Constitution has made specific commitments towards the 'backward sections of the people' to ensure their emancipation from all forms of exploitation, equal representation in public employment, and special provision for their advancement.⁵⁸

Special measures have been taken intermittently in the form of 'affirmative action' or 'positive discrimination'. However, nowhere in the Constitution does it elaborate on who can be categorised within the purview of the 'backward sections of the people'. In the absence of any objective and legislative standard for determining the propensity of disparity, disadvantage, and deprivation suffered by a particular group or community, the application of terms linked to the status of backwardness from a constitutional standpoint, causes more confusion than clarity. Unlike the Constitution of India, which specifically mentioned the social and educational aspects of backwardness,⁵⁹ the Constitution of Bangladesh has preferred to apply the status of backwardness in a generic sense, albeit without soliciting any indicators.

Considering the stark realities of inequalities and discrimination embroidered within the social structure and in pursuance of the direction of the Supreme Court of India in the Mandal Commission verdict, India has established the National Commission for Backward Classes (NCBC), which was commissioned in 2018 as a constitutional body under article 338B of the Indian Constitution. Long before launching the NCBC, 'backward sections of the people' was defined in India to include such classes, groups, and communities whose social progress is retarded, who are illiterate or poorly educated and who suffer from lack of adequate opportunities in the matter of individual and collective development due to poverty, ignorance, lack of education and other social disabilities like race, caste, and religion.⁶⁰

Contrarily, the discourse on backwardness in Bangladesh has been left much to the unchecked deference of the executives on the ground that the very nature of their official responsibilities involves frequent exposure to and engagement with the evolving socio-economic realities. For instance, the quota system in public employment was introduced through an executive order (Interim Recruitment Policy, 1972) which allocated, through subsequent amendments, 55% of the 3 quotas proportionately to the freedom fighters including their dependents, women, ethnic minorities, and physically challenged people.⁶¹ Amid a nation-wide student protest calling for reforming the quota system, the government abruptly put an end

⁵⁷ *Mohammad Shujat Ali v. Union of India*, AIR 1974 SC 1631.

⁵⁸ Bangladesh Constitution (n 2) arts 14, 28(4) and 29(3)(a).

⁵⁹ The Constitution of India (adopted 26 November 1949, entered into force 26 January 1950) art 15(4).

⁶⁰ Government of Gujrat, Report of the Socially and Educationally Backward Class Commission (vol I, 1976) 25.

⁶¹ Ministry of Cabinet Affairs, SRO No. Estt/RI/R-73/72-109 (500), 5 September 1972.

to the almost half a century old quota system for Grade-I and II jobs through another executive order.⁶²

In the name of promoting meritocracy in the top echelons of the already structurally and politically compromised public services, this broad ban on the quota system violates the constitutional guarantees made to the backward section of the population. It is also a dangerous policy move by the executives who are only interested in a populist political agenda, even though there is no recognised benchmark for assessing the status of vulnerable groups. For instance, the Dalit community in India (otherwise known as ‘untouchables’), despite constitutional commitments and promising pledges from the state authorities, is hindered due to the structural constraints spiraling within the legal and political system, which are aggravated by traditional socio-religious bias.⁶³ Without locating the contributing factors, placing a particular community or a group of people within the definition of ‘backward sections of the people’ may bring temporary relief, but in the long run it perpetuates structural inequality and leads to more injustice within a social system. Taking this plight into consideration, the Government of India established its first Backward Class Commission headed by Kaka Kalelkar in 1953 (the Kalelkar Commission) which was mandated ‘to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove difficulties and to improve their conditions’.⁶⁴

However, the report of the Kalelkar Commission was rejected due to its broad base and the failure to apply any objective standard for identifying backward classes.⁶⁵ In a move parallel to the rejection of the Kalelkar Report, positive discrimination measures based on caste criteria were all called into question.⁶⁶ In this connection, the Supreme Court of India ruled out the sub-classification of ‘more backward classes’ within the ‘Other Backward Classes’ (OBCs) and held that though caste can be a relevant factor for determining backwardness amongst the Hindus, there are other significant factors too which need to be taken into consideration like poverty, occupation, place of habitation, etc.⁶⁷ In another case, the constitution bench upheld the determination of backward classes on the basis of occupation and income, disregarding the caste question in such a process.⁶⁸

⁶²Ministry of Public Administration, Proclamation No. 05.00.0000170.11.07.18-276, 4 October 2018.

⁶³Center for Human Rights, *Challenges for Dalits in South Asia's Legal Community* (American Bar Association 2021) 23.

⁶⁴Government of India, Ministry of Social Justice and Empowerment, Annual Report of the National Commission for Backward Classes, 2012–2013, 1.

⁶⁵Nomita Yadav, ‘Other Backward Classes: Then and Now’ (2002) 37(44–45) *Economic and Political Weekly* 4495, 4495.

⁶⁶Christophe Jaffrelot, *Religion, Caste and Politics in India* (Primus Books 2010) 523.

⁶⁷*M.R. Balaji and Others v. State of Mysore*, AIR 1963 SC 649.

⁶⁸*R. Chitralkha v State of Mysore*, AIR 1964 SC 1823.

Consequently, the Socially and Educationally Backward Classes Commission headed by Parliamentarian B.P. Mandal was appointed in 1979 (Mandal Commission) with the exclusive mandate to ‘determine the criteria for defining the Socially and Educationally Backward Classes’ (SEBCs). Through testing several indicators against various cut-off points, the Commission finally adopted 11 ‘indicators or criteria’ for determining social and educational backwardness, and these 11 indicators were grouped under three broad headings, namely, social, educational, and economic.⁶⁹ The Commission gave a weightage of three points to each of the four social indicators, two points to each of the three educational indicators, and one point to each of the four economic indicators. With an aggregate of 22-point-weight, any caste under the survey scoring 11 or more was designated as backward by the Commission, and it particularly recommended structural changes through a change in relations of production.⁷⁰ Moreover, the Commission applied several tests, like stigmas of low-occupation, criminality, nomadism, beggary, and untouchability, besides inadequate representation in public services, with a view to extending the horizons of OBCs.⁷¹

However, the implementation of the recommendation set out by the Mandal Commission was legally challenged when the Indian Supreme Court upheld the recommendation of reservation for OBCs in central government services and introduced the concept of qualitative exclusion, commonly known as ‘creamy layer’ for the relatively forward-looking, better educated, and socially advanced members of OBCs.⁷² The creamy layer criteria manifest a paradigmatic policy shift from purely group-based categories toward the recognition of individual economic factors.⁷³ For instance, the Chakma community in Bangladesh is well ahead in terms of Human Development Index (HDI) when compared to the other tribal communities, and the application of tribal quotas in Grade-III and IV public services in favor of them adds a creamy layer which perpetuates systematic discrimination.⁷⁴

The Mandal Commission was successful in visualising a comprehensive road map for upholding social justice in a society that is essentially unequal and traditionally follows a hierarchical social structure.⁷⁵ The application of both the quantitative and qualitative approach formulating the indicators to determine the SEBCs and OBCs by Mandal the Commission can be accommodated, *mutatis mutandis*, towards facilitating a constructive interpretation of the status of backwardness from the Bangladesh

⁶⁹ Government of India, Report of the Backward Classes Commission, 1980 (Mandal Commission Report, 1st Part, vols I and II) (Controller of Publications 1981) 52.

⁷⁰ Durgaprasad Bhattacharya, ‘The Mandal Commission in a Historical and Statistical Perspective’ (1990) 51 *Proceedings of the Indian History Congress* 641, 646.

⁷¹ Mandal Commission Report (n 69) 54.

⁷² *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

⁷³ Laura Dudley Jenkins, *Identity and Identification in India: Defining the Disadvantaged* (Routledge-Curzon 2003) 147.

⁷⁴ Nuzhat Yasmin, Quota System in Bangladesh Civil Service: An Appraisal (Institute of Governance Studies, BRAC University, 2010) 34.

⁷⁵ Arvind Kumar, ‘Mandal, Mandal Commission and Making of an OBC Identity’ in Simhadri Somanaboina and Akhileshwari Ramagoud (eds) *The Routledge Handbook of the Other Backward Classes in India: Thought, Movements and Development* (Routledge 2022) 195.

context. Whether the evolving approach of the Supreme Court towards the enforcement of fundamental rights in the last few decades aligns with the core spirits of an activist judiciary remains debatable. The constitutional courts have initiated reproachment through changing their trajectory from *litera scripta* (strict literalism) to a more liberal approach to prevent political and bureaucratic arbitrariness.⁷⁶ However, the legal paradox involved with this process is that the very attempt to make all equal eventually requires unequal treatment of a privileged few.⁷⁷

In this backdrop, the abrupt and unqualified prohibition on the quota system in Bangladesh could have been avoided through careful consideration of the proposition made by the US when it argued that affirmative action should be ‘mended’ rather than ‘ended.’ The policy principles (Clinton Principles) are that any affirmative action program must be eliminated or reformed if it: creates a quota; accommodates preferences for unqualified individuals; formulates reverse discrimination; or continues even after its equal opportunity purposes have been achieved.⁷⁸ It has been argued that the Clinton Principles, if placed against the concerns of quota reservations in Bangladesh, would supply exceptionally befitting answers to many unresolved questions.⁷⁹ Though the social realities of Bangladesh can neither be understood from a unidirectional problem (such as racial justice) managed by the US nor can it be compared to the wider spectrum of social, cultural, and religious diversity experienced in India, the policies and guidelines thereto can be useful not only to locate the backward sections of the people but also ensuring distributive justice through preferential treatment thereto.

12.5 Conclusion

Bangladesh’s socio-economic transition from feudalism to liberal market capitalism was in no way a smooth journey. Rather it was caught up in violent armed resistance with a view to putting an end to systematic discrimination and structural inequalities. Consequently, the twin spirit of equality and non-discrimination was the frontrunner in the constitutional pledge made to its own citizens. This long-cherished social metamorphosis, projecting towards an egalitarian social structure, however, could not be materialised immediately due to several constraints like political instability, coup d’état, late bloom of parliamentary democracy, and the influence of religious extremism.

⁷⁶Ridwanul Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing 2011) 102.

⁷⁷Krishna K. Tummala, *Politics of Preference: India, United States and South Africa* (CRC Press 2015) 194.

⁷⁸Richard D Kahlenberg, ‘Class-Based Affirmative Action’ (1996) 84(4) *California Law Review* 1037, 1047.

⁷⁹Mohammad Moin Uddin and Jashim Ali Chowdhury, ‘Quota reservations in Civil Service: Arguments for a Class Based Preference System’ (2016) 21 *The Chittagong University Journal of Law* 1, 19.

The history of Bangladesh's 50 years of constitutional journey entails a constant struggle towards building a rights-sensitive social system. This is particularly true in terms of the rights realisation of women, children, and backward sections of the people who repeatedly fall into the trap of structural inequalities nurtured by traditional societies. Despite having all those riddles and obstacles, the Supreme Court of Bangladesh, being the guardian angel and custodian of the Constitution, has facilitated a nuanced approach to interpret and enforce constitutional guarantees in favour of the aforesaid three groups. The efforts of the constitutional courts have not always been successful due to certain other aggravating factors, but the true success lies within their efforts to curtail the path of progressive stance towards protection and enforcement of constitutional rights. Bangladesh may not, for now, have achieved significant progress in protecting all the constitutional guarantees made to women, children, and backward sections of the people, but the trend of gradual development through frequent judicial intervention and rights activism throughout this journey brings a positive ray of hope for future generations. Thus, despite initial setbacks, Bangladesh has successfully managed to maintain a slow yet sustained trend of elevation when it comes to the effective realisation of rights guaranteed under the constitutional architecture.

References

Books

- Ali, M.I. 2010. *Towards a Justice Delivery System for Children in Bangladesh: A Guide and Case Law on Children in Conflict with the Law*. Dhaka: UNICEF.
- Galanter, M. 1984. *Competing Equalities: Law and the Backward Classes in India*. New Delhi: OUP.
- Hoque, R. 2011. *Judicial Activism in Bangladesh: A Golden Mean Approach*. Newcastle upon Tyne: Cambridge Scholars Publishing.
- Islam, M. 2019. *Constitutional Law of Bangladesh*. Dhaka: Mullick Brother.
- Jenkins, L.D. 2003. *Identity and Identification in India: Defining the Disadvantaged*. London: Routledge-Curzon.
- Khaitan, T. 2015. *A Theory of Discrimination Law*. Oxford: OUP.
- Khan, B.U., and M.M. Rahman. 2008a. *Protection of Children in Conflict with the Law in Bangladesh*. Dhaka: Save the Children.
- Schapper, A. 2014. *From the Global to the Local: How International Rights Reach Bangladesh's Children*. London/New York: Routledge.
- Somanaboina, S., and A. Ramagoud. 2022. *The Routledge Handbook of the Other Backward Classes in India: Thought, Movements and Development*. Routledge.
- Todres, J., and S.M. King. 2020. *The Oxford Handbook of Children's Rights Law*. New York: OUP.

Chapters in Edited Books

- Hanson, Karl, and Olga Nieuwenhuys. 2020. A Child-Centered Approach to Children's Rights Law: Living Rights and Translations. In *The Oxford Handbook of Children's Rights Law*, ed. Jonathan Todres and Shani M. King, 106. New York: OUP.
- Hossain, Naomi. 2021. The SDGs and the Empowerment of Bangladesh Women. In *The Palgrave Handbook of Development Cooperation for Achieving the 2030 Agenda*, ed. Sachin Chaturvedi et al., 456. Palgrave Macmillan.
- Kumar, Arvind. 2022. Mandal, Mandal Commission and Making of an OBC Identity. In *The Routledge Handbook of the Other Backward Classes in India: Thought, Movements and Development*, ed. Simhadri Somanaboina and Akhileshwari Ramagoud, 195. Routledge.
- Shaheed, Aisha Lee Fox. 2008. Dress Codes and Modes: How Islamic is the Veil? In *The Veil: Women Writers on its History, Lore and Politics*, ed. Jennifer Heath, 294. University of California Press.
- Siddiqi, Dina Mahnaz. 2011. Islam, Gender and the Nation: The Social Life of Bangladeshi Fatwas. In *Communalism and Globalization in South Asia and Its Diaspora*, ed. Deana Heath and Chandana Mathur, 194. Routledge.
- Young, Charles M. 2006. Aristotle's Justice. In *The Blackwell Guide to Aristotle's Nicomachean Ethics*, ed. Richard Kraut, 186. Oxford: Blackwell Publishing.

Articles

- Barnard, Catherine, and Bob Hepple. 2000. Substantive Equality. *The Cambridge Law Journal* 59 (3): 562.
- Begum, Afroza. 2005. Equality of Employment in Bangladesh: A Search for the Substantive Approach to Meet the Exceptional Experience of Women in the Contemporary Workplace. *Journal of the Indian Law Institute* 47 (3): 326.
- Crenshaw, Kimberle. 1991. Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color. *Stanford Law Review* 43 (6): 1241.
- Fredman, Sandra. 2016. Substantive Equality Revisited. *International Journal of Constitutional Law* 14 (3): 712.
- Haque, Muhammad Ekramul. 2011. The Bangladesh Constitutional Framework and Human Rights. *Dhaka University Law Journal* 22 (1): 55.
- Kahlenberg, Richard D. 1996. Class-Based Affirmative Action. *California Law Review* 84 (4): 1037.
- Westen, Peter. 1982. The Empty Idea of Equality. *Harvard Law Review* 95 (3): 537.

Internet Sources

- Berkley Center for Religion, Peace and World Affairs, *Women and Religion in Bangladesh: Obstacles and Opportunities for Empowerment*. <https://berkeleycenter.georgetown.edu/publications/policy-brief-women-and-religion-in-bangladesh>. Accessed 23 Dec 2021.
- Human Rights Watch, Bangladesh: *Protect Women Against Fatwa Violence*. <https://www.hrw.org/news/2011/07/06/bangladesh-protect-women-against-fatwa-violence>. Accessed 28 Dec 2021.

Documents

- Center for Human Rights. 2021. *Challenges for Dalits in South Asia's Legal Community*. American Bar Association.
- Centre for Policy Dialogue. 2020. *Estimating Unpaid Work in Bangladesh's GDP: A Conceptual Framework for Household Satellite Accounts Approach*. CPD Policy Brief.
- Georgetown Institute for Women, Peace and Security and Peace Research Institute of Oslo. Tracking sustainable peace through inclusion, justice, and security for women (2021–22).
- Imaan, Najrana. 2012. *Justice for Children in Bangladesh: An Analysis of Recent Cases*. Save the Children.
- Imman Ali, Justice M. 2010. *Towards a Justice Delivery System for Children in Bangladesh: A Guide and Case Law on Children in Conflict with the Law*. Dhaka: UNICEF.
- Khan, Borhan Uddin, and Muhammad Mahbubur Rahman. 2008b. *Protection of Children in Conflict with the Law in Bangladesh*. Save the Children.
- Ministry of Children and Women Affairs. 2011. *National Children Policy*.
- The Children Act (Bangladesh) (Act No. XXIV of 2013). <http://bdlaws.minlaw.gov.bd/act-1119.html>. Accessed 15 Jan 2022.
- The Constitution of the People's Republic of Bangladesh (adopted 4 November 1972, entered into force 16 December 1972).

Borhan Uddin Khan is a Professor of Law at the University of Dhaka and was a former Dean, Faculty of Law (2006–2010) and Chairman, Department of Law (2015–17). He is also an Advisor and Adjunct Professor of Law at the Independent University, Bangladesh. In addition to his (LLB Hons in 1984) and LLMin 1985] from the University of Dhaka, Professor Khan holds an LLM in Public International Law (1990) from the London School of Economics and Political Science (LSE), University of London and PhD (1995) from the School of Oriental and African Studies (SOAS), University of London. He received in 2017, 'The LSE Outstanding Alumni Volunteer Award' from the London School of Economics and Political Science (LSE). His research interests include: international human rights, humanitarian, refugee, criminal and international labour law. His recent publications include, co-edited book, *Revisiting the Geneva Conventions: 1949–2019*, (Brill/Nijhoff, 2020) and *Human Rights and International Criminal Law* (forthcoming in 2022, Brill/Nijhoff).

Md Al Ifran Hossain Mollah is a Senior Lecturer in Law at the Independent University, Bangladesh. He has completed LLB (Hons) and LLM at the University of Dhaka. Mr. Mollah has also been awarded with Master of Studies in International Human Rights Law from University of Oxford with Commonwealth Scholarship. His research interest is focused on domestic application of human rights law and interdisciplinary approach to law. In addition to his teaching position, Mr. Mollah is also an accredited lawyer of the Supreme Court of Bangladesh. Several of his research articles and book chapters have been published from Routledge, Brill-Nijhoff, Springer and CUP.

Chapter 13

The ‘International Crimes’ Exception to the Fundamental Rights Regime of the Bangladesh Constitution



Quazi Omar Foysal

Abstract The inclusion of fundamental rights and their enforcement are one of the basic features of the Bangladesh Constitution, subject to certain lawful restrictions. In addition to the rights-specific grounds, articles 47(3) and 47A of the Constitution provide an additional ground for restricting certain fundamental rights. This exception centres around the trial of ‘genocide, crimes against humanity or war crimes and other crimes under international law’ that may be called the ‘international crimes’ exception to fundamental rights. This chapter addresses the questions surrounding the scope of this exception primarily from constitutional law perspective. Its introduction delineates the background, followed by (a) an account of the justifications for incorporating such exception; (b) the construction of the ‘international crimes’ exception from the constitutional and international law perspectives; and (c) a critical analysis of the consequences of the ‘international crimes’ exception on fundamental rights. It concludes with recommendations for a progressive and contextual understanding of such exceptions. Particularly, it argues that the ‘international crimes’ exception along with the Bangladesh International Crimes Tribunals Act 1973, though reflected existing international law at the time of its adoption, demands a reappraisal in the light of the development of the obligations to criminalise, prosecute, and punish the perpetrators of international crimes after 1973.

Keywords Human rights · International crimes · International Crimes Tribunals-Bangladesh · Fundamental rights · Constitutional law · International law

Q. O. Foysal (✉)

Department of Law, American International University-Bangladesh, Dhaka, Bangladesh
e-mail: quazi.foysal@graduateinstitute.ch

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*,
https://doi.org/10.1007/978-981-99-2579-7_13

13.1 Introduction

The inclusion of fundamental rights and the arrangement of enforcement of such rights are one of the basic features of the Constitution of Bangladesh (hereinafter the Bangladesh Constitution or the Constitution).¹ The fundamental rights regime established by Part III of the Constitution bears special significance due to its incorporation of certain international human rights law norms.² But the fundamental right does not possess an absolute character. Except for the right to freedom of thought and conscience, all other fundamental rights contained in the Constitution can be lawfully restricted subject to the fulfilment of some grounds.³ In addition to the rights-specific grounds, articles 47(3) and 47A of the Constitution provide an additional ground for restricting certain fundamental rights.⁴ Article 47(3) provides special safeguards for the legal regime established for the ‘detention, prosecution or punishment of any person, who is a member of any armed or defence or auxiliary forces or any individual, group of individuals or organisation or who is a prisoner of war, for genocide, crimes against humanity or war crimes and other crimes under international law’. Article 47A(1) declares the non-applicability of articles 31, 35(1), 35(3), and 44 in respect of individuals or organisations falling within the scope of article 47(3). Article 47A(2) reiterates the unavailability of the right to move to the Supreme Court of Bangladesh for any constitutional remedies. As this exception centres around the trial of ‘genocide, crimes against humanity or war crimes and other crimes under international law’, it is pertinent to term such exception as the ‘international crimes’ exception to the fundamental rights regime of the Bangladesh Constitution.

The precise scope of the ‘international crimes’ exception is not yet settled. This chapter seeks to address the questions surrounding the scope of this exception from the constitutional and international law perspectives. It starts with an introductory section delineating the background to this exception. The next part provides the justifications for incorporating the ‘international crimes’ exception followed by an interpretive analysis of the ‘international crimes’ exception. The fourth section elucidates the consequence of this exception on fundamental rights by critically examining the relevant constitutional provisions. The closing section provides recommendations for a progressive and contextual understanding of such exceptions.

¹The Constitution of the People’s Republic of Bangladesh, arts 26–47A, 102. The fundamental rights regime should be contrasted with the fundamental principles of state policy regime contained in Part II of the Constitution that does not enjoy justiciability *per se* before the Supreme Court of Bangladesh.

²Ridwanul Hoque, ‘The Founding and Making of Bangladesh’s Constitution’ in Kevin YL Tan and Ridwanul Hoque (eds), *Constitutional Foundations in South Asia* (Hart Publishing 2021) 114.

³Bangladesh Constitution, art 39(1). The grounds for the restriction of the fundamental rights can be found in the constitutional provision that incorporates a particular fundamental right.

⁴Both provisions were incorporated by the Constitution (First Amendment) Act, 1973 (hereinafter the First Amendment) and amended by the Constitution (Fifteenth Amendment) Act, 2011 (hereinafter the Fifteenth Amendment).

In particular, it argues that the 'international crimes' exception, as expanded by the Bangladesh International Crimes Tribunals Act 1973 (hereinafter ICT-BD Act),⁵ reflected existing international law at the time of its adoption. But the development of the obligations to criminalise, prosecute, and punish international crimes in international law after 1971 provides solid justifications to reconsider its scope.

As the research is related to international crimes and article 47(3) refers to 'international law' explicitly, this chapter resorts to international law sources⁶ to understand the relevant issues. The chapter also refers to the law and jurisprudence of the International Crimes Tribunal of Bangladesh (hereinafter the ICT-BD) to understand the 'international crimes' exception. Since this study is about the Bangladesh Constitution, not the ICT-BD Act *per se*, it only considers the decisions of the Supreme Court of Bangladesh while analysing the relevant provisions. Though the 'international crimes' exception was incorporated to facilitate the functioning of the ICT-BD in the context of the crimes committed during the national liberation war of Bangladesh,⁷ this research argues that Bangladesh's ratification of the Rome Statute of the International Criminal Court (hereinafter the Rome Statute) provides further justification to retain this exception in the Constitution.⁸

13.2 The Justifications for Incorporating the 'International Crimes' Exception

The State's obligations to prosecute and punish international crimes provide the justification for incorporating the 'international crimes' exception to the fundamental rights regime in Bangladesh Constitution. From the days of the Nuremberg trials, international law has gradually crystallised the obligations to prosecute and punish perpetrators of international crimes in treaties and CIL.⁹ In the language of the AD, '[t]he State has an obligation to remedy serious violations of human rights as stated by Article 8 of the Universal Declaration of Human Rights and Article 2(3) of the International Covenant on Civil and Political Rights, which ensure the right to an

⁵Act No. XIX of 1973.

⁶The Statute of the International Court of Justice (adopted 24 June 1945 and entered into force 24 October 1945) (hereinafter ICJ Statute), art 38. The sources of international law include treaty, customary international law (hereinafter CIL), general principle of law, judicial precedent and scholarly academic work.

⁷Kamal Hossain, *Bangladesh: Quest for Freedom and Justice* (University Press Limited, Dhaka 2013) 223; Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (University Press Limited, Dhaka 1983) 238.

⁸The Rome Statute of the International Criminal Court (adopted 7 June 1998 and entered into force 31 July 2002) 2187 UNTS 3.

⁹Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78(2) *California Law Review* 449.

effective remedy for violations of human rights, and to which Bangladesh has subscribed'.¹⁰ The *erga omnes* character of the obligations to prosecute and punish international crimes obligates the States to prioritise its focus on the trial of international crimes.¹¹ It is particularly relevant to Bangladesh, which witnessed large scale atrocities during its war of independence in 1971.¹² Bangladesh's pledge to ensure justice for the victims of mass atrocities is an exceptional event during the cold war era of impunity.¹³ It explains the reason why Bangladesh had to adopt adequate precautions while deciding to prosecute Pakistani prisoners of war (hereinafter PoWs) accused of committing international crimes in Bangladesh.¹⁴ The inclusion of the 'international crimes' exception to the fundamental rights regime in the Bangladesh Constitution following the First Amendment of the Constitution is one of those precautionary measures.¹⁵

13.3 The Scope of the 'International Crimes' Exception

The scope of the 'international crimes' exception to the fundamental rights can be divided into three categories: (i) subject matter scope, (ii) personal scope, and (3) temporal scope. Before analysing the scope of the 'international crimes' exception, it is useful to conduct a survey of the relevant international legal regime prevalent at the time of the First Amendment. It provides guidelines to understand its subject matter scope. In 1973, there was no comprehensive treaty regime for the prosecution and punishment of international crimes.¹⁶ Though the Convention on the Prevention

¹⁰The Appellate Division of the Supreme Court of Bangladesh (hereinafter AD), *Abdul Quader Molla v Government of Bangladesh* (Appeal Judgment) Criminal Appeal No. 24–25 of 2013 (two separate appeals by the parties merged into one) (Judgment of 17 September 2013) (hereinafter *Molla* appeal judgment), 76.

¹¹*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, para 106–113; Institute of International Law, 'Resolution on the Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes' (Krakow Session 2005).

¹²M Rafiqul Islam, *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgments* (University Press Limited, Dhaka 2019) 1–5.

¹³Quazi Omar Foysal, 'International Criminal Law: Historical Perspectives' in Mohammad Shahabuddin (ed), *Bangladesh and International Law* (Routledge 2021) 221.

¹⁴The prevalent geopolitical reality that followed the emergence of Bangladesh may also explain the need to pay additional caution by the Government of Bangladesh to formulate its strategy of prosecution of the perpetrators of international crimes; Islam (n 12) 16–20.

¹⁵Miriam Beringmeier, *The International Crimes Tribunal in Bangladesh: Critical Appraisal of Legal Framework and Jurisprudence* (Berliner Wissenschafts-Verlag 2018) 45–7.

¹⁶The initiatives taken by the International Law Commission (hereinafter the ILC), a subsidiary body of the United Nations, to promulgate a draft statute for the establishment of an international criminal could not progress fully due to the political realities of the cold war until the 1990s; see William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2020) 9–11.

and Punishment of the Crime of Genocide 1948 (hereinafter the Genocide Convention) entered into force 22 years early, Bangladesh was yet to ratify it.¹⁷ Crimes against humanity (hereinafter CAH) was incorporated in the Charter of the International Military Tribunal (hereinafter the Nuremberg Charter).¹⁸ But its definition underwent subsequent developments,¹⁹ and it can be said to have attained a permanent shape in the Rome Statute in 1998.²⁰ On the other hand, Bangladesh acceded to the Four Geneva Conventions of 1949 on 4 April 1972.²¹ But these instruments do not criminalise any violations of international humanitarian law (hereinafter IHL), instead they provide obligations to criminalise, prosecute and punish certain grave breaches of IHL.²² The concept of war crimes developed further in the 1990s and culminated in article 8 of the Rome Statute.²³ The crime of aggression, the successor of the crime against peace, was still being developed at that time²⁴ and the latest being the definition adopted by the ICC State Parties in the Kampala Conference in 2010 (art 8 *bis*).²⁵ Only solid international law sources that existed during that period were the Nuremberg Charter²⁶ and the Judgment of the

¹⁷ Convention on the Prevention and Punishment of the Crime of Genocide (Adopted 9 December 1948 and entered into force 12 January 1951) 78 UNTS 277. Bangladesh finally acceded to it on 5 October 1998. On the other hand, Pakistan ratified it on 12 October 1957.

¹⁸ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (concluded 8 August 1945 and registered 15 March 1951) 82 UNTS 279, art 6(c).

¹⁹ Generally, M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011).

²⁰ Simon Chesterman, 'Altogether Different Order: Defining the Elements of Crimes against Humanity' (2000) 10(2) *Duke Journal of Comparative & International Law* 307. Notably, ILC adopted the Rome Statute definition of CAH in its Draft articles on Prevention and Punishment of Crimes Against Humanity. See International Law Commission, 'Draft articles on Prevention and Punishment of Crimes Against Humanity' (2019) II (Part Two) *Yearbook of the International Law Commission*, 22.

²¹ Four conventions related to protections of wounded and sick in armed forces in the field (hereinafter the Geneva Convention I), wounded, sick and shipwrecks members of armed forces at sea (hereinafter Geneva Convention II), prisoners of war (hereinafter Geneva Convention III) and civilians (hereinafter Geneva Convention IV) were adopted on 12 August 1949 and they entered into force on 21 October 1950. They are collectively known as 'Four Geneva Conventions'.

²² Geneva Convention I, art 49; Geneva Convention II, art 50; Geneva Convention III, art 129; and Geneva Convention IV, art 146.

²³ Schabas (n 17) 117–140. The definition of war crime was expanded during the Kampala Conference of the ICC in 2010. It was further expanded by the Assembly of State Parties (hereinafter ASP) in 2019; see Resolution ICC-ASP/18/Res.5 (adopted by consensus on 6 December 2019).

²⁴ Even the definition of aggression adopted by the United Nations General Assembly came one year following the First Amendment. See UNGA Res 3314 (XXIX) (14 December 1974).

²⁵ The ICC's jurisdiction over the aggression was activated on 17 July 2018 by virtue of ASP's Resolution ICC-ASP/16/Res.5.

²⁶ Dominion of India is one of the twenty signatories of the Nuremberg Charter. It may be argued that as the successor States, both Pakistan and Bangladesh should be aware of its existence and bound by the CIL emanating from the Charter.

Nuremberg Tribunal.²⁷ On the other hand, the International Covenant on Civil and Political Rights (hereinafter ICCPR), though was adopted, but did not enter into force.²⁸ As a consequence, the rights of the accused, including the right to fair trials and the rights of the victims should be searched, to the extent of their crystallisation, in CIL prevalent at that time.²⁹

13.3.1 Subject Matter Scope

The subject matter scope of the ‘international crimes’ exception includes ‘genocide, crimes against humanity or war crimes and other crimes under international law’.³⁰ The definitions of the crimes demand detailed scrutiny. All these crimes trace back their origin in international law.³¹ Thus, it is pertinent to explore their definitions in international law sources. The basis of this interpretative approach is twofold. First, the phrase ‘other crimes under international law’ in article 47(3) of the Bangladesh Constitution implies that the crimes mentioned therein are international crimes, and their definition can be found in international law, contrasted with domestic law. Second, a combined reading of articles 25 and 8(2) suggests that the ‘respect for international law and the principles enunciated in the United Nations Charter’ ‘shall be a guide to the interpretation’ of article 47A. As the ICT-BD Act was enacted for ‘the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under international law’ (preamble), it is logical to consult these crimes to understand the extent to which those definitions reflect article 47(3) of the Bangladesh Constitution. At the same time, it is pertinent to investigate the extent to which those definitions reflect the international law existing in 1973.

The definition of genocide in the ICT-BD Act is a near adoption of that of the Genocide Convention except for two points.³² First, it has incorporated the ‘political’

²⁷ *France et al. v Göring et al.* (1946) 41 *American Journal of International Law* 172 (hereinafter Judgment of the Nuremberg Tribunal). Eventually, the ILC promulgated the principles contained in the Charter and the Judgment of the Tribunal. See International Law Commission, ‘Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal’ (1950) II *Yearbook of the International Law Commission* 374.

²⁸ International Covenant on Civil and Political Rights (adopted 19 December 1966 and entered into force 23 March 1976) 999 UNTS 171. Bangladesh eventually acceded to it on 6 September 2000.

²⁹ Generally, William A Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021).

³⁰ Bangladesh Constitution, art 47(3).

³¹ Genocide, CAH, and war crimes, together with the crime of aggression are the core crimes of the Rome Statute (Rome Statute, art 5).

³² In 1970, the ICJ confirmed the customary law status of the crime of genocide. See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Second Phase, Judgment of 5 February 1970, 1970 *ICJ Reports* 3, para 34.

group as an additional protected group³³ and used 'such as' instead of 'as such'.³⁴ The definition of CAH in the ICT-BD Act is also a near mirror adoption of that of the Nuremberg Charter except for two points. It has enlarged the list of offences constituting CAH³⁵ and excluded the 'armed conflict' nexus with CAH.³⁶ The ICT-BD definition of war crimes is a *verbatim* adoption of its Nuremberg Charter counterpart. Though the Nuremberg Charter definition of war crimes derived its source from the Two Geneva Conventions 1929 and the Hague Conventions of 1907,³⁷ the ICT-BD definition appears to have failed to take note of the 'grave breaches' regime of the Four Geneva Conventions.³⁸ However, the crime of 'any violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949' in section has arguably filled up that gap.³⁹

The term 'other crimes in international law' leaves the scope open for further deliberation. In international law, the list of crimes is not limited to genocide, CAH, and war crimes. In his seminal work, Bassiouni found that there exist 27 international crimes to be found in 281 conventions.⁴⁰ Many international crimes can be classified as transnational crimes.⁴¹ Furthermore, the human rights law instruments also

³³ Bangladesh is the second country of the world after Ethiopia (1957) to incorporate political group as a protected group in the definition of genocide. See William A Schabas, *Genocide in International Law* (Cambridge University Press 2009) 162.

³⁴ In the language of Linton, it 'shifts the turn to "such as" not just shifts the emphasis away from the targeting of the protected groups to the core crimes, but it also turns the Genocide Convention's closed list of core crimes into a merely illustrative list', Suzannah Linton, 'Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation' (2010) 21 *Criminal Law Forum* 191, 245–246.

³⁵ The ICT-BD definition of CAH added the offences of imprisonment, abduction, confinement, torture, and rape, and 'ethnic' as an additional ground for persecution (sec 2(2a)).

³⁶ In response to the urge of the counsel for the convict-appellant that CIL definition of CAH contains the existence of an 'international armed conflict', the AD held that there is no requirement of an 'international armed conflict' in the CIL definition of CAH; *Molla* appeal judgment (n 10) 578–79.

³⁷ The Nuremberg Judgment confirmed this position. See William A Schabas, *Relationships between International Criminal Law and Other Branches of International Law* (The Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye, Volume: 51, Brill 2022) 286–87.

³⁸ It may explain the reason for the inclusion of the 'violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949' in section 3(e) of the ICT-BD Act.

³⁹ Linton comments that '[c]ontextually, this provision comes after the war crimes' provision, and the reference to "humanitarian rules" and the "Geneva Conventions" gives the impression that the drafters may actually have intended the war crimes' provision to cover Hague law and this second provision to cover Geneva law', Linton (n 36) 265. In other words, it attracts the grave breaches regime of the Four Geneva Conventions. See Geneva Convention I, art 50; Geneva Convention II, art 51; Geneva Convention III, art 130; and Geneva Convention IV, art 147.

⁴⁰ M Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff Publishers 2014) 144.

⁴¹ See Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2015). For example, these may include transnational organised crimes and terrorism-related crimes.

created the obligation to criminalise certain violations of human rights, including torture⁴² and enforced disappearance.⁴³ As the same Parliament enacted the First Amendment and the ICT-BD Act, the latter may be helpful in interpreting ‘other crimes in international law’. The ICT-BD Act has incorporated ‘crimes against peace’ within its subject matter jurisdiction.⁴⁴ Its definition is word-by-word incorporation of that of the Nuremberg Charter.⁴⁵ At the time of the enactment of the First Amendment, there was no agreed definition of aggression, and the ILC was still working on it.⁴⁶ It may justify the inclusion of a residuary crime in article 47(3) to incorporate a new crime recognised in international law.⁴⁷ It has been evident that these definitions reflect the international law that existed in 1973. However, the development of international law after 1973 signals that these definitions should be made consistent with their current versions.⁴⁸

13.3.2 *Personal Scope*

The personal scope of the ‘international crimes’ exception to the fundamental regimes comprises three groups: (i) a member of any armed or defence or auxiliary forces, (ii) any individual, group of individuals or organisation, and (iii) a prisoner of war. As the members of any armed or defence or auxiliary forces form parts of a State organ, the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA) suggests that the definition of the first group should be understood in line with the domestic law.⁴⁹

The definition of ‘disciplined force’ provided in article 152 of the Constitution is a point of departure to interpreting the first group. It includes the following forces within its definition: (i) the army, navy or air force, (ii) the police force, and (iii) any

⁴² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 and entered into force 26 June 1987) 1465 UNTS 85, art 2. Bangladesh acceded to it on 5 October 1998.

⁴³ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006 and entered into force 23 December 2010) 2716 UNTS 3, art 4. Bangladesh is not a party to it.

⁴⁴ ICT-BD Act, sec 3(b). Interestingly, the ICT-BD Act does not enlist ‘crimes against peace’ in its preamble. Rather, it incorporated ‘other crimes under international law’.

⁴⁵ See Nuremberg Charter, art 6(a).

⁴⁶ Kirsten Sellars, *‘Crimes against Peace’ and International Law* (Cambridge University Press 2013) 260–87.

⁴⁷ As the constitutional amendment procedure is less rigid than the amendment of general legislation, this approach appears to be far reaching.

⁴⁸ The first recommendation of the final section discusses it in detail.

⁴⁹ It states that ‘[a State] organ includes any person or entity which has that status in accordance with the internal law of the State’. See International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (2001) II (Part II) *Yearbook of the International Law Commission* 20, art 4(2).

other force declared by law to be a disciplined force within the meaning of this definition.

It follows that the definitions of the forces should be taken from the founding legislation of the concerned force. These include the Army Act, 1952⁵⁰; the Air Force Act, 1953⁵¹; the Navy Ordinance, 1961⁵²; the Police Act, 1861⁵³; the Ansar Force Act, 1995⁵⁴; and the Armed Police Battalions Ordinance, 1979.⁵⁵ The ICT-BD Act provides a definition of auxiliary force. It defines 'auxiliary forces' as 'forces placed under the control of the Armed Forces for operational, administrative, static and other purposes'.⁵⁶ It is worth mentioning that the disciplinary forces do not enjoy the full length of fundamental rights granted by the Constitution.⁵⁷ As the trial of members of disciplinary force accused of international crimes falls squarely within the meaning of 'the maintenance of discipline in that force', article 45 of the Constitution provides additional justification for the inapplicability of the fundamental rights of the members of disciplinary force facing trials of international crimes.

The phrase 'any individual, group of individuals or organisation' has been inserted in article 47(3) following the Fifteenth Amendment to the Constitution in 2011.⁵⁸ The ICT-BD Act is beneficial for understanding its meaning. The 1973 version of the ICT-BD contained only 'any person'. The revised version of section 3(1) following the International Crimes (Tribunals) (Amendment) Act 2009 has incorporated 'any individual or group of individuals'.⁵⁹ The 2013 amendment of the ICT-BD Act has added the word 'organisation'.⁶⁰ The rationale for adding 'any individual, group of individuals or organisation' is to include the perpetrators outside the disciplinary force for the trial of certain international crimes.⁶¹ In several cases, the ICT-BD resorted to the phrase 'group of individuals' to interpret Joint

⁵⁰ Act No. XXXIX of 1952.

⁵¹ Act No. VI of 1953.

⁵² Ordinance No. XXXV of 1961.

⁵³ Act No. V of 1861.

⁵⁴ Act No. III of 1995.

⁵⁵ Ordinance No. XXV of 1979.

⁵⁶ ICT-BD Act, sec 2(a). In the context of the war of independence, the notorious Razakar force established by the East Pakistan Razakars Ordinance, 1971 (East Pakistan Ordinance No. X of 1971) can be defined as an auxiliary force, Islam (n 12) 60.

⁵⁷ Bangladesh Constitution, art 45. It states that '[n]othing in this Part shall apply to any provision of a disciplinary law relating to members of a disciplined force, being a provision limited to the purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force'.

⁵⁸ Fifteenth Amendment, sec 19 (ii).

⁵⁹ Act No. LV of 2009.

⁶⁰ Act No. III of 2013, sec 2. It was enacted after the Fifteenth Amendment of the Constitution.

⁶¹ The AD held that 'this substitution has been adopted for the purpose of extending jurisdiction of the Tribunal for bringing the perpetrator to book if he is found involved with the commission of the criminal acts even in the capacity of an 'individual' or member of 'group of individuals', *Molla* appeal judgment (n 10) 179.

Criminal Enterprise.⁶² But the scope of ‘organisation’ remains unclear.⁶³ The punishments enumerated in the ICT-BD Act and the general criminal legislation of Bangladesh correspond to the natural persons. Thus, it will be challenging to punish any accused organisations within the existing legal framework of Bangladesh.⁶⁴

The final group, i.e., PoW, is an international law connotation, and it should be understood with reference to international law. The Geneva Convention III contains a definition of PoW.⁶⁵ Article 44 of the Additional Protocol I to the Four Geneva Conventions has updated the 1949 definition of PoW.⁶⁶ Very interestingly, the Penal Code, 1860 contains four provisions related to PoW.⁶⁷ In particular, section 374 defines ‘PoW’ in the following language: ‘the expressions “prisoner of war” [...] shall have the same meaning as have been assigned to them [...] by Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949’. Understandably, this definition requires an amendment in line with the Additional Protocol I. The Geneva Convention III permits the Detaining Power to detain PoWs against whom there are pending criminal proceedings for an indictable offence or where they have already been convicted for such an offence until the completion of the punishment after the cessation of active hostilities.⁶⁸ Given the gravity and seriousness of war crime or other international crimes, it is safe to conclude that it is an indictable offence within the meaning of article 119 of the Geneva Convention III. Pending the completion of the punishment, the treatment of PoWs is to be governed by IHL, not human rights law.⁶⁹ Thus, the IHL regime of the

⁶² Islam (n 12) 260–63.

⁶³ The purpose of including ‘organisation’ was to try Jamaat-e-Islami as a political party for its alleged role in the commission of international crimes in 1971; Online Report, ‘ICT Act amendment to pave way for Jamaat’s trial’ Dhaka Tribune (Dhaka, 7 December 2014) <<https://archive.dhakatribune.com/uncategorized/2014/12/07/ict-act-amendment-to-pave-way-for-jamaats-trial>> accessed 25 September 2022.

⁶⁴ Beringmeier (n 15) 73–74.

⁶⁵ Geneva Convention III, art 4.

⁶⁶ Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (adopted 08 June 1977 and entered into effect 23 January 1979) 1125 UNTS 3 (hereinafter Additional Protocol I). Bangladesh acceded to it on 08 March 1981.

⁶⁷ Act No. XLV of 1860. The relevant provisions are: (i) 128 (public servant voluntarily allowing prisoner of State or war to escape), 129 (public servant negligently suffering such prisoner to escape), 130 (aiding escape of, rescuing or harbouring such prisoner), and 374 (unlawful compulsory labour).

⁶⁸ Geneva Convention III, art 119, para 5.

⁶⁹ Ibid, art 5. The practice of applicability of human rights in the contexts governed by IHL was not well-established in the 1970s; see Robert Kolb, ‘Human Rights and Humanitarian Law’, *Max Planck Encyclopedias of International Law* (March 2013), §1, <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e8111>> accessed 22 September 2022, para 19–21.

trials of PoWs accused of indictable crimes will be useful to understand the rationale of incorporating PoWs within the scope of the 'international crimes' exception.⁷⁰

13.3.3 Temporal Scope

The temporal scope of the 'international crimes' exception raises some challenges. A plain reading of article 47(3) of the Constitution leads to the conclusion that this exception becomes applicable when any person falls within the scope of 'detention, prosecution or punishment' of 'genocide, crimes against humanity or war crimes and other crimes under international law'. In other words, the 'international crimes' exception will become applicable following the detention. As article 47A does not exclude the applicability of article 33, the term 'detention' should be interpreted consistent with the constitutional safeguards as to arrest and detention. As the application of article 47A bears heavy consequence upon the persons concerned, the legal framework for the arrest and detention of persons falling within the scope of the 'international crimes' exception should provide additional procedural safeguards than the corresponding general criminal procedure.⁷¹

13.4 The Consequence of the 'International Crimes' Exception

The consequence of the 'international crimes' exception is twofold. First, it provides special protection to the legislation providing the framework of detention, prosecution, or punishment of any person for the crimes mentioned in the earlier sections. No law or its provision prohibiting international crimes and prosecuting their perpetrators 'shall be deemed void or unlawful, or ever to have become void or unlawful, on the ground that such law or provision of any such law is inconsistent with, or repugnant to, any of the provisions of this Constitution'.⁷² It provides Parliament *carte blanche* authority to legislate for the trial of international crimes even by disregarding the provisions of the Bangladesh Constitution, including fundamental rights.⁷³ It also indicates the possibility of establishing a special legal regime for the detention, prosecution, and punishment of persons and crimes that

⁷⁰ Peter Rowe, 'Penal or Disciplinary Proceedings Brought against a Prisoner of War' in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 1025.

⁷¹ The third recommendation of the final section discusses it in detail.

⁷² Bangladesh Constitution, art 47(3).

⁷³ Article 7(2) states that any law inconsistent with the Constitution shall, to the extent of its inconsistency, be declared void. Article 26 further states that any law inconsistent with the fundamental rights shall be declared void.

fall within the scope of the ‘international crimes’ exception. It created the beaten path for the enactment of the ICT-BD in 1973⁷⁴ and the International Crimes Tribunal Rules of Procedure 2010 (hereinafter the ICT RoP).⁷⁵

Before the establishment of the International Criminal Court (hereinafter the ICC), the first permanent international court for the trial of international crimes, almost all the tribunals exercising jurisdiction over international crimes faced the challenge of the legality of their founding instruments.⁷⁶ Because they were principally *ex-post facto* legislation dealing with crimes committed before their adoption and all tribunals have their own justifications.⁷⁷ Notably, almost all the Tribunals justified their jurisdictions on the pretext of the customary nature of subject matters under their jurisdictions.⁷⁸ Bangladesh, the first State to enact domestic legislation for the trial of international crimes, resorted to a novel approach while dealing with the issue of *ex-post facto* legislation, i.e., the constitutional protection of such legislation.⁷⁹ Despite its novelty, the rationale for the protection provided by article 47(3) of the Bangladesh Constitution aligns with the Nuremberg dictum during its adoption.

Second, the ‘international crimes’ exception impacts on the personal enjoyment of certain fundamental rights. These rights are contained in articles 31, 35(1), 35(3) and 44 of the Bangladesh Constitution. Article 31 provides that

To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

⁷⁴ICT-BD Act, preamble.

⁷⁵According to article 152 of the Bangladesh Constitution, the definition of ‘law’ includes ‘rules’. Section 22 of the ICT-BD Act states, ‘[s]ubject to the provision of this Act, a Tribunal may regulate its own procedure’.

⁷⁶Generally, Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009).

⁷⁷For example, the Judgment of the Nuremberg Tribunal provides a solid point of departure. It states that:

it is to be observed that the maxim “*nullum crimen sine lege*” is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. (Judgment of the Nuremberg Tribunal (n 27) 219)

⁷⁸Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2019) 18–20.

⁷⁹Foysal (n 13) 222.

In general circumstances, any person may be deprived of the right to protection of law in accordance with law.⁸⁰ But article 47A creates an additional exception that leads to the deprivation of the opportunity to challenge any *ex-post facto* legislation purportedly not amounting to 'in accordance with law'.

The impact of the 'international crimes' exception on article 35(1) and (3) can be said to be the perceived objectives of the First Amendment. Article 35 deals with the protection in respect of trial and punishment. In particular, article 35(1) prohibits the prosecution of *ex-post facto* crimes and imposition of *ex-post facto* punishment.⁸¹ As the ICT-BD Act is considered to be *ex-post facto* legislation during its adoption, this protection was particularly relevant for safeguarding it from any legal challenge before the Supreme Court of Bangladesh. As mentioned in the preceding paragraph, many trials of international crimes faced challenges based on the principle of legality. The *Molla* appeal judgment confronted the issue of the legality of the amendment of section 23 after the trial judgment and pending the appeal.⁸² The counsel for the convict-appellant challenged the retrospective extension of the right to appeal as a violation of article 35(1). But the AD held that the amendment in question neither creates any new offences nor increases the punishment. Being procedural in nature, the amendment of Section 23 of the ICT-BD Act does not fall within the scope of article 35(1).⁸³

Though the subject matter jurisdiction of the ICT-BD has not attracted any judicial challenges, international law provides sufficient support to sketch the potential responses. As mentioned earlier, the crimes within the jurisdiction of the ICT-BD Act reflect CIL at the time of its enactment.⁸⁴ At this juncture, the tests of accessibility and foreseeability developed by the European Court of Human Rights to examine the legality of certain crimes are useful to determine the legality of *ex-post facto* legislation in general.⁸⁵ At the time of the enactment of the ICT-BD Act, it was sufficiently accessible to the perpetrators that their conducts were criminalised in international law.⁸⁶ Furthermore, it is foreseeable to the perpetrators that their conducts were susceptible to penalisation in international law.⁸⁷ However, the opportunity to challenge the legality of the ICT-BD Act would solidify the legitimacy of the ICT-BD, leaving aside its legality question.

⁸⁰ Mahmudul Islam, Constitutional Law of Bangladesh (Mullick Brothers 2012) 248–53. Notably, the question of retrospectivity falls within the scope of 'in accordance with law'.

⁸¹ The principles of *nullum crimen sine lege* and *nulla poena sine lege*.

⁸² In particular, the International Crimes (Tribunals) (Amendment) Act, 2013 provided Prosecution's right to appeal any sentence passed by ITC-BD and made it effective from 14 July 2009.

⁸³ *Molla* appeal judgment (n 10) 167–8.

⁸⁴ See the subject matter scope of the 'international crimes' exception.

⁸⁵ European Court of Human Rights, 'Guide on article 13 of the Convention – No punishment without law the principle: that only the law can define a crime and prescribe a penalty' (Updated up to 31 August 2022), <https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf> accessed 20 September 2022, para 23–47.

⁸⁶ *ibid.*, para 27

⁸⁷ *ibid.*, para 26, 34.

Article 35(3) of the Constitution provides that '[e]very person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial Court or Tribunal established by law'. The right to a speedy and public trial by a lawfully established independent and impartial court or tribunal is a crucial component of the right to a fair trial.⁸⁸ Article 35(6) provides an exception to the right to a fair trial in respect of 'the operation of any existing law which prescribes any punishment or procedure for trial'.⁸⁹ It implies that the law that provides 'any punishment or procedure for trial' and enacted after the commencement of the Constitution does not benefit from this exception. It renders it necessary to extend the exception to article 35(3) to the ICT-BD Act. Thus, the framers of the First Amendment considered it necessary to put the right to a fair trial provided in article 35(3) within the scope of the 'international crimes' exception. However, the right to fair trial should not be seen as a hurdle to ensure justice for the victims of international crimes. Rather, it should be seen as a mean to establish the same. Thus, a balanced approach should be adopted while applying this exception to Article 35(3) of the Constitution.

Finally, the 'international crimes' exception hinders a person from seeking any constitutional remedies at the High Court Division of the Supreme Court of Bangladesh (hereinafter the HCD).⁹⁰ Article 44 guarantees the right to move to the HCD under article 102 or any other courts empowered by an Act of Parliament to enforce the fundamental rights of the Constitution.⁹¹ The justiciability of fundamental rights is one of the core features of the Bangladesh Constitution. But the rights provided in article 44 are not absolute. In particular, the Constitution empowers the President to suspend the right to enforce any specified fundamental constitutional rights during a Proclamation of Emergency.⁹² The rationale for suspending the enforcement of fundamental rights during a Proclamation of Emergency is self-evident from the context. Following this logic, the rationale for suspending the same for the purpose of the trial of international crimes should also be explored from the context.⁹³ As articles 47(3) and 47A are related to detention, prosecution and punishment of international crimes, the wholesale deprivation of the right to seek remedies before the HCD appears to be very problematic. Not all fundamental rights are

⁸⁸ Islam (n 81) 299–300. Interestingly, the ICCPR designates the right to fair trial as a non-derogable right; ICCPR, arts 4 and 14. On the other hand, the right to fair trial is crucial in establishing the right to truth and justice of the victims.

⁸⁹ Article 152 of the Bangladesh Constitution defines 'existing law' as 'any law in force in, or in any part of, the territory of Bangladesh immediately before the commencement of this Constitution, whether or not it has been brought into operation'.

⁹⁰ Bangladesh Constitution, art 47A(2).

⁹¹ Article 102 of the Constitution provides the powers of HCD to issue certain orders and directions, etc.

⁹² Bangladesh Constitution, art 141C.

⁹³ The rationale for incorporating the 'international crimes' exception discussed in the second section provides the context of such suspension.

related to the detention, prosecution and punishment of crimes.⁹⁴ Thus, this provision may be reconstructed so that the rights of an accused having no impact on detention, prosecution and punishment of crimes are not hampered.

The scope of article 47A was discussed in the *Molla* review judgment.⁹⁵ The core question was whether the AD could entertain its review jurisdiction over any review of the judgment of the ICT-BD Act.⁹⁶ The argument of the Attorney General for Bangladesh is based on the interpretation of article 47A(2). He argued that 'in view of Article 47A(2) of the Constitution, review petitions are not maintainable from the judgment of this Division, in the absence of any provision for review in the [ICT-BD Act]'.⁹⁷ On the other hand, the counsel for the petitioner argued that 'the review petition is maintainable in view of Article 105 of the Constitution read with Order XXVI of the Supreme Court of Bangladesh (Appellate Division) Rules, 1998'.⁹⁸ The AD held that a review is maintainable in the exercise of its inherent power with a view to 'securing ends of justice'.⁹⁹ It further held that its jurisdiction to 'review its judgment has not been ousted either directly or indirectly by Article 47A(2)'.¹⁰⁰ The confirmation of the review jurisdiction of the AD in respect of judgments of the ICT-BD Act paved the way for six additional review petitions.¹⁰¹

13.5 Conclusion

Historically, the 'international crimes' exception to the fundamental rights regime was adopted to facilitate the trials of Pakistani PoWs accused of committing international crimes. Subsequently, both the ICT-BD Act and articles 47(3) and 47A expanded their scopes to try other categories of perpetrators. But Bangladesh's current status of international law obligations renders the 'international crimes' exception still relevant for future trials of international crimes in Bangladesh. From this perspective, this chapter proposes three recommendations.

First, Bangladesh should understand the 'international crimes' exception in light of both retrospective and prospective applications. This exception appears to be

⁹⁴ For example, freedom of religion (art 41).

⁹⁵ AD, *Abdul Quader Molla v The Chief Prosecutor, International Crimes Tribunal, Dhaka* (Review Judgment) Criminal Review Petition Nos. 17–18 of 2013. (From the judgment and order dated 17.9.2013 passed by the Appellate Division in Criminal Appeal Nos. 24–25 of 2013) (Judgment of 12 December 2013) (hereinafter *Molla* review judgment) 7.

⁹⁶ *ibid.*, 5–6.

⁹⁷ *ibid.*

⁹⁸ *ibid.* Article 105 of the Constitution states that '[t]he Appellate Division shall have power, subject to the provisions of any Act of Parliament and of any rules made by that division to review any judgment pronounced or order made by it'.

⁹⁹ *Molla* review judgment (n 95) 21–22.

¹⁰⁰ *ibid.*, 7–8.

¹⁰¹ Islam (n 12) 380–81.

consistent with Bangladesh's international law obligations in 1971. But international law as it stands now provides very solid obligations to prosecute and punish international crimes with progressive characteristics. Being mindful of its painful past and commitment to justice and accountability, Bangladesh also became parties to several treaties incorporating such obligations. Notably, the Genocide Convention includes the obligations to criminalise, prosecute and punish genocide at the domestic level.¹⁰² Besides, the Rome Statute provides an implicit obligation to criminalise its core crimes and investigate and prosecute the same.¹⁰³ Additional Protocol I has also extended the grave breaches regime.¹⁰⁴ The right to effective remedy incorporated in article 2(2) of the ICCPR can also be interpreted to include an obligation to criminalise international crimes and investigate and prosecute the same.¹⁰⁵ The *erga omnes* character of the obligations to prosecute and punish certain international crimes, notably genocide,¹⁰⁶ provides another justification for paying attention to the domestic implementation of the prohibition of international crimes, the failure of which will raise the issue of international responsibility of the State in question.¹⁰⁷ The *jus cogens* nature of international crimes,¹⁰⁸ the constant challenges on the defence of immunity,¹⁰⁹ and the propagation of universal criminal jurisdiction¹¹⁰ provide additional justifications for a prospective understanding of the 'international crimes' exception.

Articles 47(3) and 47A do not specify the event of the atrocities committed in 1971.¹¹¹ On the other hand, the ICT-BD Act also allows both retrospective and

¹⁰² Genocide Conventions, arts I, IV, V and VI.

¹⁰³ This interpretation is based on the complementarity regime of the Rome Statute. Furthermore, it provided updated definitions of international crimes, the Rome Statute, arts 5-8bis, 17.

¹⁰⁴ Additional Protocol I, art 85.

¹⁰⁵ Paul M Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) 82–84.

¹⁰⁶ Resolution on the Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes (n 11).

¹⁰⁷ In its Application Instituting Proceedings, The Gambia claimed that Myanmar violated the obligation to criminalise genocide in pursuance of Article V of the Genocide Convention; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures (11 November 2019), para 111–2.

¹⁰⁸ See International Law Commission, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*)', A/CN.4/L.967 (11 May 2022), annex.

¹⁰⁹ See International Law Commission, 'Immunity of State Officials from Foreign Criminal Jurisdiction', A/CN.4/L.969 (31 May 2022).

¹¹⁰ See International Law Commission, 'Universal Criminal Jurisdiction', *Report of the International Law Commission*, Seventieth Session (30 April–1 June and 2 July–10 August 2018), A/73/10, 307.

¹¹¹ Article 7B of the Bangladesh Constitution converted both provisions as unamendable.

prospective applications.¹¹² This author has argued elsewhere that the ICT-BD has jurisdiction to prosecute certain crimes committed against the Rohingya.¹¹³ It provides a justification to understand the 'international crimes' exception in light of the present-day scenario. This potential reconsideration of the 'international crimes' exception may offer an opportunity to re-interpret this exception with reference to Bangladesh's current international law obligations, including the extended definitions of international crimes as reflected in the current state of international law.

Second, the ICCPR did not enter into force during the incorporation of the 'international crimes' exception. At present, as a party, Bangladesh is under an obligation to implement the rights contained in the ICCPR. Though international law is not directly applicable in the Bangladeshi courts without its incorporation as the law of the land,¹¹⁴ the lack of implementing domestic law is not a valid justification for its failure to perform its international obligations.¹¹⁵ It demands the proper inclusion of rights contained in the ICCPR in the legislation that provides the framework for the trial of international crimes, i.e., the ICT-BD Act and its RoP. During the functioning of the ICT-BD, its procedural aspects encountered several human rights-based criticisms.¹¹⁶ The assessment of the compatibility of the procedural regime of the ICT-BD with human rights law is outside the scope of this chapter. Regardless of any potential debates, Bangladesh should constantly review the procedural regime of the trials of international crimes in light of its human rights commitment.

And finally, it has been argued that the application of the 'international crimes' exception brings heavy consequences to the fundamental constitutional rights of persons falling within its scope. It calls for additional procedural safeguards while detaining, prosecuting, and punishing the accused compared with corresponding general criminal procedure. As this exception commences with the detention of an accused of international crimes, the legal framework of detaining those persons should be reconsidered. As article 47A does not provide any restrictions upon Parliament to provide any rights in the implementing legislation, it should consider Bangladesh's international law obligation while enacting the same.¹¹⁷ For instance, it may raise the bar of the threshold of proof for the confirmation of charges and provide a scope of participation of the accused in the process of framing charges and

¹¹²ICT-BD Act, sec 3(1).

¹¹³Quazi Omar Foysal, 'The Prospects of Prosecuting Rohingya Deportation before the International Crimes Tribunal, Bangladesh (ICT-BD)' (OpinioJuris, 11 February 2021) < <http://opiniojuris.org/2021/02/11/the-prospects-of-prosecuting-rohingya-deportation-before-the-international-crimes-tribunal-bangladesh-ict-bd/> > accessed 22 September 2022.

¹¹⁴AD, *Hussain Mohammad Ershad v Bangladesh*, 53 DLR (2001) 102.

¹¹⁵Vienna Convention on the Law of Treaties (adopted 23 May 1969 and entered into force 27 January 1980) 1155 UNTS 331, art 27.

¹¹⁶Islam (n 12) 410–33.

¹¹⁷Beringmeier (n 15) 219–21.

his right to challenge the same.¹¹⁸ However, it is to be ensured that these safeguards should not be susceptible to ‘abuse of process’ by any accused.¹¹⁹

The trial of international crimes stands at the crossroad of the rights of the victims and the accused. The provision of a right to fair trial to the accused is necessary to ensure the legitimacy of the trial process.¹²⁰ At the same time, the victims’ right to truth and justice should be ensured while ensuring the right of fair trial of the accused.¹²¹ Thus, it is advisable to ensure appropriate balance between the rights of the accused and the rights of the victims while applying the ‘international crimes’ exception to the fundamental rights. It will also uphold Bangladesh’s constitutional obligation to respect international law.¹²²

References

Books

- Ahmed, M. 1983. *Bangladesh: Era of Sheikh Mujibur Rahman*. Dhaka: University Press Limited.
- Bassiouni, M.C. 2011. *Crimes against Humanity: Historical Evolution and Contemporary Application*. Cambridge: Cambridge University Press.
- . 2014. *Introduction to International Criminal Law*. Boston: Martinus Nijhoff Publishers.
- Beringmeier, M. 2018. *The International Crimes Tribunal in Bangladesh: Critical Appraisal of Legal Framework and Jurisprudence*. Berlin: Berliner Wissenschafts-Verlag.
- Cryer, R., D. Robinson, and S. Vasiliev. 2019. *An Introduction to International Criminal Law and Procedure*. Cambridge: Cambridge University Press.
- Gallant, K.S. 2009. *The Principle of Legality in International and Comparative Criminal Law*. New York: Cambridge University Press.
- Hossain, K. 2013. *Bangladesh: Quest for Freedom and Justice*. Dhaka: University Press Limited.
- Islam, M. 2012. *Constitutional Law of Bangladesh*. Dhaka: Mullick Brothers.
- Islam, M.R. 2019. *National Trials of International Crimes in Bangladesh: Transitional Justice as Reflected in Judgments*. Dhaka: University Press Limited.
- Boister, N., and R.J. Currie, eds. 2015. *Routledge Handbook of Transnational Criminal Law*. London: Routledge.
- Schabas, W.A. 2009. *Genocide in International Law*. Cambridge: Cambridge University Press.
- . 2020. *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press.
- . 2021. *The Customary International Law of Human Rights*. Oxford: OUP.

¹¹⁸The pre-trial practice of the ICC may provide some guidelines; see Schabas (n 17) 249–300.

¹¹⁹For example, in the *Molla* review judgment, the AD reduced the limitation period for filing a review petition than that of general petitions so that any accused may not abuse the process; *Molla* review judgment (n 95) 20–1. Similar approach may be taken in respect of those safeguards.

¹²⁰See ICTY Appeals Chamber, *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995), para 41–48.

¹²¹Salvatore Zappalà, ‘The Rights of Victims v. the Rights of the Accused’ (2010) 8(1) *Journal of International Criminal Justice* 137.

¹²²Bangladesh Constitution, art 25.

- . 2022. *Relationships between International Criminal Law and Other Branches of International Law*. Vol. 51. Brill: The Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye.
- Sellars, K. 2013. *Crimes against Peace' and International Law*. Cambridge: Cambridge University Press.
- Taylor, P.M. 2020. *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights*. Cambridge: Cambridge University Press.

Chapters in Edited Books

- Foysal, Q.O. 2021a. International Criminal Law: Historical Perspectives. In *Bangladesh and International Law*, ed. M. Shahabuddin, 219–229. Oxon: Routledge.
- Hoque, R. 2021. The Founding and Making of Bangladesh's Constitution. In *Constitutional Foundations in South Asia*, ed. Tan KYL and R. Hoque, 91–120. Oxford: Hart Publishing.
- Rowe, P. 2015. Penal or Disciplinary Proceedings Brought against a Prisoner of War. In *The 1949 Geneva Conventions: A Commentary*, ed. A. Clapham, P. Gaeta, and M. Sassòli, 1025–1038. Oxford: OUP.

Articles

- Chesterman, C. 2000. Altogether Different Order: Defining the Elements of Crimes against Humanity. *Duke Journal of Comparative & International Law* 10 (2): 307.
- Linton, S. 2010. Completing the Circle: Accountability for the Crimes of the 1971 Bangladesh War of Liberation. *Criminal Law Forum* 21: 191.
- Roht-Arriaza, N. 1990. State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law. *California Law Review* 78 (2): 449.
- Zappalà, S. 2010. The Rights of Victims v. the Rights of the Accused. *Journal of International Criminal Justice* 8 (1): 137.

Internet Sources

- Foysal QO. 2021b. The Prospects of Prosecuting Rohingya Deportation before the International Crimes Tribunal, Bangladesh (ICT-BD) (OpinioJuris, 11 February 2021). <http://opiniojuris.org/2021/02/11/the-prospects-of-prosecuting-rohingya-deportation-before-the-international-crimes-tribunal-bangladesh-ict-bd/>. Accessed 22 Sep 2022.
- Kolb R. 2013. Human Rights and Humanitarian Law. Max Planck Encyclopedias of International Law (March 2013), §1. <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e811>. Accessed 22 Sep 2022.
- Online Report. 2014. ICT Act amendment to pave way for Jamaat's trial. Tribune (Dhaka Tribune, 7 December 2014). <https://archive.dhakatribune.com/uncategorized/2014/12/07/ict-act-amendment-to-pave-way-for-jamaats-trial>. Accessed 25 Sep 2022.

Documents

- Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal 1945, 82 UNTS 279.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85.
- Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277.
- Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.
- Draft articles on Prevention and Punishment of Crimes Against Humanity. 2019. II (Part II) *Yearbook of the International Law Commission* 22.
- Draft Articles on Responsibility of States for Internationally Wrongful Acts . 2001. II (Part II) *Yearbook of the International Law Commission* 20.
- Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), A/CN.4/L.967 (11 May 2022).
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 287.
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85.
- Geneva Convention relative to the Treatment of Prisoners of War 1949, 75 UNTS 135.
- Immunity of State Officials from Foreign Criminal Jurisdiction. A/CN.4/L.969 (31 May 2022).
- International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3.
- International Covenant on Civil and Political Rights 1966, 999 UNTS 171.
- Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. 1950. II *Yearbook of the International Law Commission* 374.
- Protocol additional to the Geneva Conventions 1949, 1125 UNTS 3.
- The Rome Statute of the International Criminal Court 1998, 2187 UNTS 3.
- The Statute of the International Court of Justice 1945.
- Universal Criminal Jurisdiction. 2018. *Report of the International Law Commission*, Seventieth Session (30 April-1 June and 2 July-10 August 2018), A/73/10, 307.
- Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

Quazi Omar Foysal is a legal researcher and Bangladesh-qualified lawyer. He has obtained Advanced master's in international law from Université Catholique de Louvain, Belgium, LLM in International Humanitarian Law and Human Rights from the Geneva Academy of International Humanitarian Law and Human Rights, Switzerland, and LLB (Honours) from the University of Dhaka, Bangladesh. He has taught law in several Bangladeshi universities and worked with several national and international organisations.

Chapter 14

Environmental Constitutionalism in Bangladesh: From Recognition to Practice in the Twenty-First Century



Shawkat Alam and S M Atia Naznin

Abstract The Bangladesh Constitution has continued to demonstrate an inextricable link between the right to a safe and clean environment with other human rights reflecting the increasing global consensus to recognise and protect environmental rights through constitutional protections. The chapter explores the ‘greening’ of Bangladesh’s Constitution that has occurred against the global movement towards sustainable development. It examines how fundamental rights to a safe and clean environment have been read into the Constitution and provides a critical appraisal of the 2011 amendment which includes explicit protection of the right to an environment. It specifically evaluates the judicial enforcement of the constitutional environmental provisions. The Bangladesh Constitution has evolved with international protections to the right to an environment from single-issue instruments and safeguards to a wider recognition of a clean environment encompassing many ecosystem interactions in the context of anthropogenic biodiversity loss and climate change.

Keywords Environment · Constitution · Recognition · Right to life · Right to clean environment · Sustainable development · Biodiversity · Climate change

14.1 Introduction

The unprecedented degradation of the planet’s vital ecosystems constitutes one of the most pressing issues confronting the international community. In an era characterised by a rapidly expanding global ecological crisis and climate change, there is greater acknowledgment of the need for domestic recognition, implementation, and efforts of states to combat and mitigate their impact on human society and the Anthropocene. Particularly since the early 1970s, national constitutions around the world have embodied environmental provisions at the

S. Alam (✉) · S. M. A. Naznin
Macquarie Law School, Macquarie University, Sydney, NSW, Australia
e-mail: shawkat.alam@mq.edu.au; atia.naznin@mq.edu.au

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*,
https://doi.org/10.1007/978-981-99-2579-7_14

confluence of numerous facets of international law including human rights law, constitutional law, and environmental law.¹ Being an emerging notion, environmental constitutionalism thus aspires for environmental protection and governance by invoking domestic constitutional provisions.

The key catalyst behind the emergence and development of environmental constitutionalism is largely shaped by the recognition of environmental rights at the international level in the 1970s.² At the international level, the 1972 *Declaration of the United Nations Conference on the Human Environment* (hereinafter, *Stockholm Declaration*) represents the first major instrument of international law to assert a connection between human rights and environmental protection. Domestic efforts to enhance environmental jurisprudence through judicial enforcement of environmental rights have facilitated the expansion of environmental constitutionalism.

As we reflect on 50 years since the inception of the Bangladesh Constitution, this also presents an opportunity to reflect on another key document created in 1972: the United Nations Conference on the Human Environment and the recognition of the indivisibility between environmental, social, and economic development. Against this backdrop, sustainable development has continued to influence and shape Bangladesh's constitutional tradition in important and lasting terms. From the landmark decision of the *FAP-20* and *Radioactive Milk* cases³ to the constitutional insertion of article 18A in 2011 as well as post-2011, the Bangladesh Constitution and the Supreme Court has continued to demonstrate an inextricable link of the right to a safe and clean environment with other human rights and constitutional protections.

This chapter explores the 'greening' of the Bangladesh Constitution that has been occurred against the global movement towards linking human rights and the environment. It considers how the fundamental right to a safe and clean environment has been read into the Constitution and provides a critical appraisal of the 2011 amendment which includes the State's endeavour to protect and preserve the environment. Since courts play a critical role in interpreting and enforcing constitutional recognition of environmental protection, it provides an evaluation of its enforceability by examining aspects of judicial enforcement of the constitutional environmental provision. The Bangladesh Constitution has evolved with international protections of the right to an environment from single-issue instruments

¹Liel K Weis, 'Environmental Constitutionalism: Aspiration or Transformation?' (2018) 16 I-CON 836; James R May and Erin Daly, *Judicial Handbook on Environmental Constitutionalism*, UN Environment Programme (March 2017) 1; more than 100 national constitutions across the world have recognised environmental rights in numerous forms; for instance, the *Constitution of the Democratic Republic of East Timor*, art 61(2) states that 'the State recognizes the need to preserve . . . natural resources'; Likewise, the *Constitution of the Democratic Socialist Republic of Sri Lanka*, art 27(14) reiterates that 'the State shall protect, preserve, and improve the environment for the benefit of the community'.

²Joshua C Gellers, *The Global Emergence of Constitutional Environmental Rights* (Routledge 2017) 10.

³*Dr. Mohiuddin Farooque v Bangladesh and Others* (1996) 48 DLR (HD) 438 (the *Radioactive Milk* case); also *Farooque v Government of Bangladesh*, WP 998 of 1994, CA 24 of 1995 (25 July 1996), para 101 (the *FAP-20* case).

and safeguards to a wider recognition to a clean environment that encompasses many ecosystem interactions in the context of anthropogenic biodiversity loss and climate change.

Accordingly, this chapter examines (1) the development of environmental rights under international law; (2) the scope of constitutional environmental rights to impose divergent layers of state obligations affecting their enforceability; (3) key catalysts behind the constitutional recognition of environmental rights in Bangladesh; (4) the role of the Court to implement the constitutional recognition of environmental provisions in view of judgments in public interest litigation as the key catalyst in emerging environmental constitutionalism in Bangladesh; and (5) whether these protections suffer from procedural complexities and jurisdictional limitations despite the establishment of Environmental Courts since 2010.⁴ It observes that in absence of a substantive environmental right in Bangladesh, petitioners seek to redress environmental harm by invoking the writ jurisdiction of the Supreme Court.

14.2 Understanding Environmental Constitutionalism

Constitutionalism embraces a notion of governance where the constitution, being the supreme domestic law, guides governmental organs in performing their duties. In another way, it stresses the realisation of rights and their enforcement through judicial pronouncements.⁵ In this context, environmental constitutionalism is a recent idea that strives to protect and preserve the environment by embodying and invoking constitutional environmental provisions.⁶ Essentially, the key focus of environmental constitutionalism is ‘environmental rights’⁷ or broadly speaking environmental ‘care’ that provides ‘the foundation for legitimising and guiding governance’.⁸ As the development of environmental constitutionalism aligns with the environmental rights revolution,⁹ to understand its essence, it is pertinent to examine the international environmental rights regime at the outset.

⁴Abul Hasnat, ‘Environmental Courts in Enforcement: The Role of Law in Environmental Justice in Bangladesh’ (2021) 21 *Australian Journal of Asian Law* 85.

⁵David R Boyd, *The Environment Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press 2012) 4, 5.

⁶James R May and Erin Daly (eds) *Environmental Constitutionalism* (Edward Elgar Publishing 2016).

⁷JC Gellers, ‘Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis’ (2015) 6 *Journal of Human Rights and the Environment* 75; JC Gellers, ‘Environmental Constitutionalism in South Asia: Analyzing the Experiences of Nepal and Sri Lanka’ (2015) 4 *Transnational Environmental Law* 395.

⁸LJ Kotzé, ‘Arguing Global Environmental Constitutionalism’ (2012) 1 *Transnational Environmental Law* 199, 208.

⁹David R Boyd, *The Environment Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press 2012) 4, 5.

The emergence of environmental rights dates back to the adoption of the *Stockholm Declaration* at the United Nations Conference on Human Environment. The declaration is the first international document to acknowledge the mutual interaction between the realisation of human rights and environmental protection. It recognises the environment as a key to human well-being and the fulfilment of human rights particularly the right to life. Further, it reiterates that living in a quality environment is a prerequisite to enjoying the fundamental right to freedom, equality, and adequate conditions of life.¹⁰ However, the rights-based approach to the environment as adopted in the declaration is limited as instead of recognising a substantive right to the environment, it articulates environmental rights as a derivative of the right to life or suggests living in a healthy environment as necessary to other human rights.¹¹

The Earth Summit of 1992 further added to the progress by adopting the *Rio Declaration* as the masterpiece of international environmental law. The declaration invokes the concept of sustainable development as an ideal to guide combat global environmental degradation.¹² Sustainable development brought with it the rise of environmental jurisprudence,¹³ and the ‘greening’ of international law. As the *Rio Declaration* reiterates, ‘to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’.¹⁴ The right to development, as first recognised by principle 4 of this declaration, therefore, must pay attention to the developmental and environmental needs of present and future generations. While not terming environmental rights explicitly in the language of fundamental rights, the agreement promoted the idea that human beings are entitled to a healthy and productive life in harmony with nature. Further, like the 1982 *World Charter for Nature* it recognises procedural environmental rights.

Since the *Rio Declaration*, several other key documents have contributed to the development of environmental rights. The Report of the World Commission on Environment and Development, namely, *Our Common Future* declares respectively that ‘All human beings have the fundamental right to an environment adequate for their health and wellbeing’, ‘States shall conserve and use the environment and natural resources for the benefit of present and future generations’ and ‘States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, shall preserve biological diversity, and shall observe the principle of

¹⁰ Declaration on the United Nations Conference on Human Environment, Stockholm, principle 1, para 2, UN Doc A/COF.48/14/rev.1 (16 June 1972)

¹¹ S Atapattu, ‘The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Healthy Environment under International Law’ (2002) 16 *Tulane Environmental Law Journal* 65, 74.

¹² Foo Kim Boon, ‘The Rio Declaration and Its Influence on International Environmental Laws’ (1992) 2 *Singapore Journal of Legal Studies* 347, 363.

¹³ G Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge 2012); R Holifield et al. (eds), *Spaces of Environmental Justice* (Wiley-Blackwell 2010); David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (OUP 2007).

¹⁴ *The Rio Declaration on Environment and Development* 1992, principle 4.

optimum sustainable yield in the use of living natural resources and ecosystems'.¹⁵ In 1994, the UN Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Ms. Ksentini submitted a final report which urged that the recognition of a right to a satisfactory environment should be recognised as an independent right.¹⁶ Although the *Draft Declaration on the Principles of Human Rights and the Environment* that accompanied her report is yet to be adopted it bears significance for providing an explicit recognition of substantive and procedural environmental rights.¹⁷

The attempt to acknowledge environmental rights at the international level has gained momentum through the adoption of several resolutions of human rights and the environment by the UN Human Rights Council.¹⁸ For instance, in 2012 the Council passed a resolution with a mandate to study environment-centred human rights obligations, identify related best practices, and provide recommendations to achieve environmental sustainability.¹⁹ More recently, through another resolution, the Council emphasised the protection of the rights of vulnerable people who are disproportionately impacted by climate change.²⁰ While these resolutions are limited to recognising the right to the environment, they put forward practical means to realise environmental rights. Further, the effort of the Human Rights Council alongside diverse international instruments has inspired the development of environmental constitutionalism by providing a foundational link among human rights, the environment, and corresponding state obligations.

14.3 Recognition and Development of Environmental Constitutionalism

The essence of environmental constitutionalism lies in the achievement of environmental justice that encompasses natural resource management and human health concerns, as a course for addressing social and environmental inequality²¹ which

¹⁵ Our Common Future <<http://www.un-documents.net/ocf-a1.htm>> accessed 31 May 2022).

¹⁶ Ms. Fatma Zohra Kestini, *Review of Further Development in the Fields with which the Sub-Commission has been Concerned Human Rights and Environment*, Economic and Social Council, E/CN.4/Sub.2/1994/9, 6 July 1994.

¹⁷ See parts I - III of the *Draft Declaration on Principles of Human Rights and Environment*, E/CN.4/Sub.2/1994/9, 6 July 1994.

¹⁸ The UN Human Rights Council adopted its first resolution on Human Rights and Climate Change on 28 March 2008, UN Doc A/HRC/10/61 (2009)) for the Council meeting in March 2009. On 25 March 2009, the Council adopted Resolution 10/4 'Human rights and climate change', <<http://www2.ohchr.org/english/issues/climatechange/index.htm>> accessed 31 May 2022.

¹⁹ Human Rights Council, A/HRC/RES/19/10, 19 April 2012.

²⁰ Human Rights Council, A/HRC/RES/47/24, 26 July 2021.

²¹ Giovanna Di Chiro, 'Environmental Justice from the Grassroots: Reflections of History, Gender and Expertise' in Daniel J Faber (ed), *The Struggle for Ecological Democracy: Environmental*

cannot be established without vibrant and dynamic approaches to put global commitments into practice. Effective state mechanisms such as administrative, legislative, and judicial systems are the instruments through which environmental justice is ensured and distributed across society. In UNDP's assessment, legal transformation facilitates curbing abuses of power that accelerate the sufferings of the poor and vulnerable driven from the disproportionate sharing of environmental burdens like pollution, and environmental benefits including access and benefits that arose from natural resources.²² The current natural resources governance process often results in multiple deprivations and marginalisation, as evidenced in IUCN and UNHRC's studies, and in many cases generates further poverty through the depletion of natural assets and creates prejudice to the exercise of basic rights.²³

Hence, improved governance through legal and institutional innovations can respond to the converging risks of inequality and environmental change. Empowering poor and vulnerable communities to challenge and reverse declining trends in natural resources is another key factor as well to improving resource governance. Lack of or limited access to legal and judicial remedies, however, is a key barrier to bringing transformative changes in global poverty and environmental degradation. Enabling increased access to justice thus is one means to combat this, calling for the legal and social empowerment of the vulnerable groups, and freedom from inequities that result from unsustainable forms of resource use are also other methods.²⁴ This can be achieved and facilitated through the constitutional recognition of environmental rights that can enable citizens to seek remedies for environmental harm and promote accountability against government and corporate decisions.

The breadth of environmental constitutionalism lies in the domestic recognition of environmental rights encompassing individual and collective concerns relating to the environment. Depending on countries' legal traditions and contexts, the rights are manifested as procedural rights, solidarity rights, directive policies or principles, reciprocal rights, or a combination of these.²⁵ The variation in the embodiment of the environmental constitutional provisions reflects in effecting a diverse range of state obligations. For instance, while a substantive right to a healthy environment is capable of judicial enforcement, contra-judicative provisions containing directive or fundamental principles or state policies regarding the environment only manifest as

Justice Movements in the United States (The Guilford Press 1998) 104; Julie Sze and Jonathan K London, 'Environmental Justice at the Crossroads: A Critical Introduction to the 'State of the Field'' (2008) 2 *Sociology Compass* 1331, 1334.

²² cf. UN Development Programme (n 22) 5.

²³ IUCN, *Human Rights and the Environment: Overlapping Issues* (2007) 1; UNHRC, *Study on Human Rights and the Environment, Report of UN High Commissioner for Human Rights*, 19th Session of Human Rights Council, Geneva, UN Doc A/HRC/19/34 (2011).

²⁴ See Kishan Khoday & Leisa Perch, *Green Equity: Environmental Justice for Inclusive Growth: Policy Research Brief No.19*. Contribution of International Policy Center for Inclusive Growth (2012) 1.

²⁵ cf. May and Daly (n 1) 1.

aspirations.²⁶ As this chapter explores below, such provisions still carry weight in environmental litigation and matters arising of constitutional interpretation.

Aligned with the recognition of environmental rights in international law, countries around the world have been exhibiting an increasing tendency in enshrining constitutional environmental provisions. As of 2020, 159 national constitutions expressly or impliedly recognise some forms of right to a quality environment.²⁷ Whilst some recognise narrow environmental rights concerning water, or climate change, or have provided procedural environmental rights, others have recognised a more general substantive right to a quality environment. These rights are either framed as an individual right owned by citizens, or as a corresponding duty owed by individuals or the state. While adopting environmental provisions, national constitutions generally follow a dual approach; either recognising the right to the environment as a fundamental right or as a guiding principle of state policy.

Fundamental environmental rights emphasise recognition of some degree of environmental quality including for instance a right to an adequate, safe, clean, healthy, productive, and harmonious environment. For instance, *the Constitution of South Africa 1996* recognises everyone's right to an environment that is not harmful to their health or well-being (article 24). Likewise, the *Constitution of Timor Leste 2002* recognises 'the right to a humane, healthy, and ecologically balanced environment' (article 62), while the *Constitution of Spain 1978* states that 'everyone has the right to an environment suitable for the development of that person' (article 1(45)). Constitutions also consider the needs of certain groups of people in respective fundamental environmental provisions. The *Constitution of El Salvador 1983* for instance acknowledges every child's right to live in favourable environmental conditions as necessary for his development (article 34). Countries also refer to related norms concerning sustainable development or cultural advancement in these substantive environmental provisions. For example, Ecuador asserts the right of everyone to live in an environment that guarantees sustainability.²⁸ Some countries combine substantive environmental rights with other constitutionally protected human rights including rights to dignity, health, life, or shelter. For instance, the *Constitution of Moldova 1994* states that every individual has the right to live in an environment that is ecologically safe for life and health (article 37).²⁹

Alternatively, constitutional recognition may also come in the form of directives to state policy. Constitutional directives on state policy preserve the discretion of the legislature and the executive to protect the environment and are generally non-enforceable provisions. Moreover, being non-enforceable, they are placed outside the scope of the enforcement mechanisms, including some forms of litigation, thus limiting their efficacy to redress environmental harms. However, the scope of

²⁶ cf. Weis (n 1).

²⁷ Comparative Constitutions Project, *Constitute* (Web page, 6 October 2020) <<https://perma.cc/9AMN-5C8P>> accessed 23 May 2022.

²⁸ *The Constitution of Ecuador 2008*, art 32.

²⁹ Also, *The Constitution of Brazil 1988*, art 5.

directive principles to reflect the state's commitment to creating favourable conditions to protect rights and freedom and to guide the governance of the country signifies their essence.³⁰ For instance, the Indian Constitution 1950 asserts the state's requirement to endeavour to protect and improve the environment (48A),³¹ which provides the Indian Government considerable policy discretion as to how to realise this guiding directive. As such, fundamental rights provisions ensure a greater degree of protection as they constitute a higher legal norm. Further, these rights are legally enforceable, and subject to less political influences, and thus more likely to be realised. Fundamental rights remain explicit in outlining corresponding rights and responsibilities of states as well as individuals. Interestingly, therefore, a constitutional effort to compromise between provisions of fundamental rights and state policies provisions is also visible. Angola's Constitution provides a perfect example in this regard. While recognising the fundamental right to a healthy and unpolluted environment, it adopts a state policy stipulating that any act detrimental to environmental protection remains enforceable.³²

To supplement substantive constitutional environmental provisions, more than 30 countries have incorporated procedural rights in environmental matters in their constitutions. Adoption of such rights is intended to further the implementation of the substantive environmental provisions. For instance, the *Constitution of Albania 1998* states that 'everyone has the right to be informed about the status of the environment and its protection' (article 56). Procedural environmental rights include rights to information, participation, and access to justice. In other words, these rights are termed as participatory rights for enabling individuals to influence governmental decisions concerning the environment.³³ Accordingly, information rights denote access to timely and trustworthy information from designated governmental bodies about any plan or project affecting the environment. Likewise, participatory rights permit individuals to design governmental plans on environmental issues by attending public consultations, and by submitting questions or comments. Lastly, adjudicatory rights allow persons to litigate and seek effective remedies against retrogressive state actions causing environmental injury. Effective utilisation of these procedural rights, by empowering people to raise awareness and increasing participation, contributes to further state accountability and provides legitimacy of government actions.³⁴ They facilitate environmental governance by

³⁰ *Keshavananda v State of Kerala*, AIR 1973 SC 1461.

³¹ For similar provisions see art 5 of the *Constitution of Burundi 2018*.

³² *The Constitution of Angola 2010*, art 39.

³³ Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff Publishers 2011) 85–86; Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge 2016) 47.

³⁴ cf. UN Environment Programme (n 31) 101.

providing conducive conditions for democracy and deliberation³⁵ and access to effective redress for environmental grievances and injustice.³⁶

14.4 Environmental Constitutionalism in Bangladesh: From an Implied Constitutional Right to Article 18A

The *Constitution of Bangladesh* recognises environmental rights both indirectly as a fundamental right and directly as a directive of state policy under article 18A. Regarding the former, the Bangladesh Supreme Court has read environmental protections into key fundamental rights, namely the ‘right to life’ under articles 31 and 32 of the Constitution. Article 31 provides that every citizen has a right to be protected from unlawful actions detrimental to life, liberty, body, reputation, or property. As per article 32, no person should be deprived of a right or personal liberty save in accordance with the law. When construed together, these two articles provide for a fundamental right to life. This fundamental right to life encompasses within its broad ambit of the protection of the environment and preservation of ecological balance free from pollution of air, water, and sanitation.³⁷ Thus, any act or omission contrary to the protection and preservation of satisfactory environmental conditions infringes the fundamental right to life.

The *Constitution of Bangladesh* also explicitly provides provisions for a clean environment as a principle of state policy stipulated under article 18A. The article reiterates the State’s ‘endeavour to protect and improve the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forests, and wildlife for the present and future citizens’. However, being a principle of the state policy, as well as its use of the operative word of ‘endeavour’ indicates that the Bangladesh Government has significant discretion in how to realise this directive. Nevertheless, the language of article 18A is praiseworthy as it embodies an independent provision recognising the need for environmental protection and preservation, and the call for government policy to act on this issue.

There remain five possible reasons to catalyse the insertion of article 18A. The first relates to the extent of environmental problems causing Bangladesh’s vulnerability to protect the environment. Bangladesh has been facing numerous environmental challenges such as air and water pollution, improper waste and chemical management, depletion of forests, destruction of biodiversity or decimation

³⁵James R. May, ‘Constitutional Directions in Procedural Environmental Rights’ (2013) 28 *Journal of Environmental Law and Litigation* 27, 28.

³⁶Joshua C. Gellers and Chris Jeffords, ‘Toward Environmental Democracy? Procedural Environmental Rights and Environmental Democracy’ (2018) 18 *Global Environmental Politics* 99.

³⁷*Farooque vs. Government of Bangladesh*, WP 998 of 1994, CA 24 of 1995 (25 July 1996), para 101.

of wildlife numbers, land degradation from soil salinity, amongst others.³⁸ While economic growth can facilitate sound environmental management and maximise environmental protection,³⁹ Bangladesh is a lower-middle-income country.⁴⁰ Rather than introducing an immediately enforceable constitutional right to the environment, policymakers need to adopt environmental provisions as principles that are subject to progressive realisation. Thus, article 18A reflects a compromise between the recognition of Bangladesh's exposure to environmental degradation and the country's economic capacity to realise fully-fledged environmental protections.

Second, article 18A attempts to align with the progressive development of international law norms, principles, and practices. It is the first and only explicit constitutional environmental provision with an explicit reference to the country's commitment to protect and preserve the environment. Despite the absence of a recognition of the right to a decent environment, a textual interpretation of the provisions suggests that it affirms the principle of intergenerational equity and the principle of sustainability. The provision also affirms Bangladesh's commitment to the preservation and protection of the environment to attain sustainable development. Bangladesh has by far signed 28 international instruments relating to the environment.⁴¹ Further, the country is involved in a range of regional initiatives towards environmental protection.⁴² Despite the country having a plethora of environmental laws, rules, and policies,⁴³ such an explicit constitutional recognition has strengthened its commitment and effort to protect and preserve the environment. For instance, following the constitutional mandate of article 18A, the *Biodiversity Act* was passed in 2017 that aligns with the country's international obligation toward biodiversity protection.

Third, the development of environmental jurisprudence codifies existing constitutional protections which have emerged through public interest litigation in neighbouring South Asian counterparts such as India, Pakistan, and Sri Lanka. Previously, in the absence of a substantive right to a satisfactory environment, the judiciary read environmental protections into fundamental rights provisions. In 1987, the Indian Supreme Court observed that industrial occupation close to human occupancy gives

³⁸ Neville C Gregory *et al*, 'Recent Concerns about the Environment in Bangladesh' (2010) 39 *Outlook on Agriculture* 115.

³⁹ Brij Mohan, *Life Lessons from Gitaji on the New Economy* (Notion Press 2020); Tim Everett *et al.*, *Economic Growth and the Environment* (Defra Evidence and Analysis Series, Paper 2, March 2010) 16.

⁴⁰ See <<https://www.worldbank.org/en/country/bangladesh/overview#1>> accessed 30 May 2022.

⁴¹ For instance, *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, TIAS No 16–1104.

⁴² For instance, the SAARC Environment Action Plan (Male, 15–16 October 1997) while identifying numerous major concerns of the SAARC member States set out the parameters and modalities to facilitate regional cooperation. Later in 2008, a SAARC Ministerial Meeting on Climate Change adopted the Dhaka Declaration and SAARC Action Plan on Climate Change.

⁴³ For instance, *Environment Conservation Act 1995*, *Environment Court Act 2010*, *Wildlife Conservation and Security Act 2010*, *Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013*, *Bangladesh Biodiversity Act 2017*, *National Environment Policy 1992*, etc.

rights to public liability and, therefore, should be relocated and issued numerous mandatory orders to oversee State's compliance with the court's direction regarding environmental protection.⁴⁴ Also, in a 1994 case, the Pakistan Supreme Court held that the right to a clean environment is a part of the fundamental right to life.⁴⁵ In its landmark judgment, the Sri Lankan Supreme Court reasserted the concept of sustainable development and emphasised the domestic incorporation of international environmental obligations.⁴⁶

The Bangladesh Supreme Court followed this approach to indirectly enforce environmental issues through other rights as evident through several key decisions. Referring to numerous Indian cases including *Virender Gaur v State of Haryana*,⁴⁷ Tafazzul Hossain J observed that the government's failure to provide safe and clean drinking water constitutes a public health hazard and violates the right to life as guaranteed by articles 31 and 32 of the Bangladesh Constitution.⁴⁸ In addition, in the *FAP-20* case, the right to a healthy environment was read into the right to life with the Supreme Court of Bangladesh finding that the right to life '...encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed'.⁴⁹ Likewise, in the *Industrial Pollution* case, ABM Khairul Hoque J stated that life essentially encompasses 'qualitative life, among others free from environmental hazards'.⁵⁰ Following these cases, up until the insertion of article 18A in 2011, public interest litigation invoked fundamental rights provisions to enforce environmental rights.⁵¹

Another significant development as evidenced in numerous PILs relates to the Supreme Court's liberal approach to recognising and enforcing the constitutional existence of the Public Trust Doctrine.⁵² Specifically, the Court refers to article

⁴⁴ *M.C. Mehta v Union of India*, AIR 1987; also, *Dehradun v State Uttar Pradesh* AIR 1987 SC;

⁴⁵ *Shehla Zia v WAPDA*, PLD 1994 SC 693.

⁴⁶ *Bulankulama v Ministry of Industrial Development* (2000) LKSC 18.

⁴⁷ [2] SCC 577 (1995) 7.

⁴⁸ *Rabiya Bhuyian, MP v Ministry of LGRD and Others*, 59 DLR (AD) 176 (2007).

⁴⁹ *Farooque vs. Government of Bangladesh*, supra note 3.

⁵⁰ *Dr. Mohiuddin Farouque v Bangladesh and Others*, 55 DLR (HCD) 69 (2003).

⁵¹ For instance, in *Khushi Kabir and Others v. Government of Bangladesh and Others*, WP No 3091/2000 the High Court Division observed that the government orders regarding commercial shrimp constitute a breach of art 32 of the constitution.

⁵² A traditional definition of the Public Trust Doctrine suggests that 'submerged and submersible lands are preserved for public use in navigation, fishing and recreation and State as a trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of waters for those purposes.' See Henry Campbell Black, *Black's Law Dictionary* (West Publishing Company 1996); It is observed that 'the doctrine imposes three limitations upon the governmental authority: first, the property subject to the trust must be used only for a public purpose while it remains available for general public use; second, the property is not a subject for sale; and third, it must be maintained for particular types of uses', see Joseph L Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471-566, 477.

21(1) that imposes ‘a duty upon every citizen to protect public property’.⁵³ Being a fundamental principle of State policies, this provision seems apparently non-enforceable. However, a growing consensus on the recognition of the ‘violations approach’ suggests these principles are at least negatively enforceable.⁵⁴ As the Court expressly recognises, the justiciability bar of the State Policies only applies to positive enforcement. However, when violations occur due to any regressive actions, the Court can validly interfere to redress the alleged wrong considering it as an infringement of negative state obligations.⁵⁵ Thus, article 21 (1) when read with article 8(2) imposes a negative obligation upon the State to protect public property. The court specifically applied the doctrine by reflecting on the State’s role as a trustee of public trust to protect the natural and mineral resources.⁵⁶ In a subsequent case, it exhibited a more active role by directing the government to protect the ecologically protected zones of Cox’s Bazar Sea beach.⁵⁷

Recently, in the popularly cited *Turag River* case, by relying on the public trust doctrine, the Court declared rivers as legal persons and living entities. By declaring the concerned government authorities as the legal guardian of all rivers in Bangladesh it outlined a State duty to protect, conserve and develop rivers while saving them from any encroachment and pollution.⁵⁸ Prior to this, the Court explicitly utilised the public trust doctrine to order the government to remove illegal installations and establishments from the banks of the *Karnaphuli* river.⁵⁹ Thus, by extending the public trust doctrine to environmental protection cases, the Court has contributed to progressive development of environmental constitutionalism in Bangladesh.

Finally, although some commentators have argued that domestic influences primarily drive the adoption of the constitutional recognition of the environment over global or regional influences,⁶⁰ the fact that many of these South Asian countries share similar constitutional frameworks and a body of jurisprudence which emerged through public interest litigation created the impetus to take the next step to codify such rights. As explicitly recognised by the Nepalese Supreme Court in the *Godavari Marble* case, the Indian Supreme Court recognised standing from its Directive

⁵³ *Human Rights and Peace for Bangladesh v Bangladesh* (2010) 22 BLC 48.

⁵⁴ For a discussion on the violation approach in the Bangladesh context, see SM Atia Naznin, ‘Slum Dwellers and Forced Evictions’ in Mohammad Shahabuddin (ed), *Bangladesh and International Law* (Routledge 2021) 311–22.

⁵⁵ *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (HCD) 179; For further discussion, see Muhammad Ekramul Haque, ‘Legal and Constitutional Status of Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh’ (2005) 16(1) *Journal of Faculty of Law* (University of Dhaka) 45–81; Muhammad Ekramul Haque, ‘Does Part III of the *Constitution of Bangladesh* Contain Only Economic and Social Rights?’ (2012) 23(1) *Dhaka University Law Journal* 45–51.

⁵⁶ *Shah Abdul Hannan v Bangladesh* (2011) 16 BLC 386.

⁵⁷ *Faridul Alam v Bangladesh* (2010) 18 BLT 323.

⁵⁸ *Human Rights and Peace for Bangladesh v Bangladesh* (2019) WP No 13989/2016.

⁵⁹ *Human Rights and Peace for Bangladesh v Bangladesh* (2010) WP No 6306/2010.

⁶⁰ Joshua C Gellars, ‘Environmental Constitutionalism in South Asia: Analysing the Experiences of Nepal and Sri Lanka’ (2015) 4 *Transnational Environmental Law* 395, 422.

Principles of the State (in *Shree Sachidananda Pandey v State of West Bengal*), therefore as Nepal mirrors such environmental directives, ‘the existence of *locus standi* of the petitioner in the present case should not be ruled out’.⁶¹ This demonstrates both the potential for cross-pollination of environmental constitutionalism across South Asia due to shared constitutional traditions in place and the impact that public interest litigation plays in developing constitutional environmental rights. As these rights were being developed and expanded upon by judiciaries and public interest litigation across South Asia, enshrining a constitutional right to the environment through article 18A presented the next logical evolution for environmental justice in Bangladesh.

14.5 Implementing Article 18A and the Way Forward

Despite the explicit recognition of environmental rights under article 18A of the Bangladesh Constitution, being a directive of state policy, it still has an impact concerning standing and remedies available for potential litigants. The Constitution empowers the High Court Division of the Supreme Court (HCD) to issue orders on the application of ‘any person aggrieved’, having *locus standi* or the right to litigate.⁶² In *FAP-20*,⁶³ an ‘aggrieved person’ is not confined to a direct victim arising from the matter, but can also extend to any person or association with sufficient and *bona fide* interests to litigate in respect to a subject matter of great public concern.⁶⁴ As a result, environmental NGOs and other rights based organisations can engage in public interest litigation to protect these *bona fide* interests while promoting constitutional environmental rights in Bangladesh.

However, as article 18A is a directive of state policy and not a substantive fundamental right held under the Constitution, this does impact the type of remedies available for potential litigants and how matters are brought before the Court. While the court appreciated the continuous effort of public interest litigation petitioners in litigating environmental causes, on numerous occasions, it initiated *suo moto* proceeding,⁶⁵ reflecting the fact that article 18A is a non-justiciable and non-enforceable provision that its primary purpose is to construe the Constitution as per article 8. Such judicial motion has contributed to the development of public interest litigation jurisprudence by validating the public importance and urgency of specific

⁶¹ *Suray Prasad Sharma Dhungel v. Godavari Marble Industries and others*, WP 35/1992 (1995.10.31) (‘Godavari Marble’).

⁶² *The Constitution of Bangladesh*, art 102.

⁶³ *FAP-20* case, *supra* note 1; see also *Kazi Moklesur Rahman v Bangladesh and another*, 26 DLR SC 44 (1974).

⁶⁴ *Dr Mohiuddin Farooque v Bangladesh and Others*, 17 BLD (AD) 1997, 1.

⁶⁵ For instance, The HCD in a *suo moto* proceeding ordered the demolition of a building that was constructed on natural water bodies; see *President, Bangladesh Garments Manufacturers and Exporters Association (BGMEA) v Government of Bangladesh* (2016).

environmental causes. As such, to seek a remedy, many litigants must continue to demonstrate a nexus with a fundamental right, such as the right to life as previously described above. In doing so, public interest litigants have been successful in obtaining important remedies to address environmental harm including directions, injunctions, and damages, to orders which require the closure and relocation of hazardous industries⁶⁶ and phasing out polluting vehicles to replace them with cleaner alternatives.⁶⁷ To monitor the implementation of the judgment, the court also orders the concerned government to submit periodic reports of compliance.⁶⁸

Despite the need to demonstrate a nexus with a fundamental right, more recent decisions from the Bangladesh Supreme Court have indicated that article 18A has been invoked in its own right to guide constitutional interpretation in other cases. In *Rana Surong v Government of Bangladesh and others*,⁶⁹ the Appellate Division of the Supreme Court (AD) referred to article 18A to issue new orders which took into consideration the State's obligation to protect and improve the environment. Under these new orders, whilst trees were still being removed in the *Jhemai Punjee* area to make way for a tea estate, the developer was required to abate environmental harm by performing offsets. In another recent example, the AD prevented the development of a hotel marked within an ecologically critical area (ECA). In *Government of Bangladesh and others v Md Mushfaqur Rahman and another*,⁷⁰ a leaseholder transferred their lease to a third-party developer. After issuing a no-objection certificate to the proposed hotel development, the Government cancelled the lease and ordered the leaseholder to return the land to the Government due to a breach of the lease agreement. Following a decision in favour of the writ petitioners in the HCD, the state was ordered on appeal to return the money from the lease agreement to the leaseholder but prevented development in the ecologically critical area after referring to their article 18A obligations.

These cases demonstrate that whilst article 18A cannot be a justiciable ground to litigate, the Court can issue new orders which take into consideration the requirement for the state to protect and improve the environment. These cases demonstrate that article 18A has become an essential tool for constitutional interpretation which has enabled more environment-friendly judgments from the apex court of Bangladesh.⁷¹ Yet these cases issued orders in instances where the original decision-maker failed to make any consideration of environmental impacts and their obligations held under article 18A.

⁶⁶ *Bangladesh Environmental Lawyers Association (BELA) v Bangladesh and Others*, Writ Petition No 1430 of 2003.

⁶⁷ *Dr. Mohiuddin Farooque v Bangladesh and Others*, Writ Petition No 300 of 1995.

⁶⁸ *Writ petition no 13989 of 2016; Bangladesh Environmental Lawyers Association v Bangladesh and Others*, Writ Petition No 1430 of 2003.

⁶⁹ 72 DLR (AD) (2020) 153.

⁷⁰ 72 DLR (AD) (2020) 211.

⁷¹ Moumita Das Gupta, 'The Emergence of Environmental Right as a Constitutional Right in Bangladesh: Reflection of Global Perspectives in National Legal Regime' (2021) 4 *SCLS Law Review* 7, 14.

It remains to be seen whether the Court will issue such orders in future instances where the decision-maker has considered the environmental impact and their obligation to protect and improve the environment yet have balanced their decision against other fundamental directives and principles of state policy. In this respect, reference can be made to both articles 15 (basic necessities) and 16 (rural development) of the Constitution which require the state to provide necessities of life, the right to work, and adopt effective measures to enable rural development. Should a decision-maker take into consideration article 18A and yet have taken more weight towards other directives of state policy, this may be a non-justiciable matter and it will remain open to the Court to determine whether existing case law concerning other fundamental rights (i.e., the right to life) will guide the Court to find that adequate balance between economic, social, and environmental factors.

14.6 Conclusion

Environmental constitutionalism has continued to make strides to codifying environmental rights and providing them with the status as a core obligation held by the state. Whilst different countries around the globe have taken numerous approaches to environmental constitutionalism for various driving factors, it plays an important part in implementing the first principles of sustainable development and environmental justice that have emerged in international environmental law. Article 18A presents a watershed moment for environmental constitutionalism in Bangladesh. Whilst public interest litigation has encouraged the Court to read environmental rights into existing substantive fundamental rights held under the Constitution, such as the right to life, recent developments have demonstrated that article 18A remains a critical tool for constitutional interpretation. The Court has played an important role in issuing orders that are consistent with the Constitution, viz, that the decision-maker has taken into account due consideration of their obligation to protect and improve the environment.

Indeed the Supreme Court has positively indicated that it will require the decision-makers to respect the directives principles of state policy pursuant to article 8 of the Constitution. However, it remains to be seen whether the Court will issue such orders in an instance where a decision-maker has given less weight to the environmental impact as per art 18A when balancing with other competing priorities, such as the provision of basic necessities under article 15 or rural development under article 16. For an adequate balance between competing forces, reference must be made to the principles underpinning environmental justice and ensuring an adequate balance that is advocated under the concept of sustainable development. In the era of anthropocene, undue consideration of the environmental impact resulting from human activity will continue to exacerbate inequalities for communities that do not have the capacity or resilience to manage climate change and pollution-related impacts.

References

Books

- Atapattu, Sumudu. 2016. *Human Rights Approaches to Climate Change: Challenges and Opportunities*. New York: Routledge.
- Boyd, David R. 2012. *The Environment Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment*. Vancouver: UBC Press.
- Gellers, Joshua C. 2017. *The Global Emergence of Constitutional Environmental Rights*. London: Routledge.
- Holifield, R., et al., eds. 2010. *Spaces of Environmental Justice*. Chichester: Wiley-Blackwell.
- Leib, Linda Hajjar. 2011. *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives*. Boston: Martinus Nijhoff Publishers.
- May, James, and Erin Daly, eds. 2016. *Environmental Constitutionalism*. Edward Elgar Publishing.
- May, James R and Erin Daly. 2017. *Judicial Handbook on Environmental Constitutionalism*. UN Environment Programme.
- Mohan, Brij. 2020. *Life Lessons from Gitaji on the New Economy*. Notion Press.
- Schlossberg, David. 2007. *Defining Environmental Justice: Theories, Movements, and Nature*. New York: OUP.
- Walker, G. 2012. *Environmental Justice: Concepts, Evidence and Politics*. London: Routledge.

Chapters in Edited Books

- Di Chiro, Giovanna. 1998. Environmental Justice from the Grassroots: Reflections of History, Gender and Expertise. In *The Struggle for Ecological Democracy: Environmental Justice Movements in the United States*, ed. Daniel J. Faber, 104. New York: The Guilford Press.
- Naznin, S.M. Atia. 2021. Slum Dwellers and Forced Evictions. In *Bangladesh and International Law*, ed. Mohammad Shahabuddin, 311–322. Oxon: Routledge.

Articles

- Atapattu, Sumudu. 2002. The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Healthy Environment under International Law. *Tulane Environmental Law Journal* 16: 65.
- Boon, Foo Kim. 1992. The Rio Declaration and Its Influence on International Environmental Laws. *Singapore Journal of Legal Studies* 2: 347.
- Gellers, J.C. 2015a. Environmental Constitutionalism in South Asia: Analyzing the Experiences of Nepal and Sri Lanka. *Transnational Environmental Law* 4: 395.
- Gellers, Joshua C. 2015b. Explaining the Emergence of Constitutional Environmental Rights: A Global Quantitative Analysis. *Journal of Human Rights and the Environment* 6: 75.
- Gellers, Joshua C., and Chris Jeffords. 2018. Toward Environmental Democracy? Procedural Environmental Rights and Environmental Democracy. *Global Environmental Politics* 18: 99.
- Gellers, Joshua C. 2015c. Environmental Constitutionalism in South Asia: Analysing the Experiences of Nepal and Sri Lanka. *Transnational Environmental Law* 4: 395.
- Gregory, Naville C., et al. 2010. Recent Concerns about the Environment in Bangladesh. *Outlook on Agriculture* 39: 115.
- Gupta, Moumita Das. 2021. The Emergence of Environmental Right as a Constitutional Right in Bangladesh: Reflection of Global Perspectives in National Legal Regime. *SCLS Law Review* 4: 7.

- Haque, Muhammad Ekramul. 2012. Does Part III of the Constitution of Bangladesh Contain Only Economic and Social Rights? *Dhaka University Law Journal* 23 (1): 45–51.
- Haque, Muhammad Ekramul. 2005. Legal and Constitutional Status of Fundamental Principles of State Policy as Embodied in the Constitution of Bangladesh. *Journal of Faculty of Law*. (University of Dhaka) 16 (1): 45–81.
- Hasnat, Abul. 2021. Environmental Courts in Enforcement: The Role of Law in Environmental Justice in Bangladesh. *Australian Journal of Asian Law* 21: 85.
- Kotzé, L.J. 2012. Arguing Global Environmental Constitutionalism. *Transnational Environmental Law* 1: 199.
- May, James R. 2013. Constitutional Directions in Procedural Environmental Rights. *Journal of Environmental Law and Litigation* 28: 27.
- Sax, Joseph L. 1970. The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention. *Michigan Law Review* 68: 471.
- Sze, Julie, and Jonathan K. London. 2008. Environmental Justice at the Crossroads: A Critical Introduction to the 'State of the Field'. *Sociology Compass* 2: 1331.
- Weis, Liel K. 2018. Environmental Constitutionalism: Aspiration or Transformation? *International Journal of Constitutional Law I-CON* 16: 836.

Documents

- Declaration on the United Nations Conference on Human Environment, Stockholm, UN Doc A/COF.48/14/rev.1 (16 June 1972).
- Draft Declaration on Principles of Human Rights and Environment, E/CN.4/Sub.2/1994/9, 6 July 1994.
- Human Rights and Climate Change on 28 March 2008, UN Doc A/HRC/10/61 (2009).
- IUCN, Human Rights and the Environment: Overlapping Issues (2007).
- Kestini, Ms Fatma Zohra. 1994. Review of Further Development in the Fields with which the Sub-Commission has been Concerned Human Rights and Environment, Economic and Social Council, E/CN.4/Sub.2/1994/9 (6 July 1994).
- Khoday, K., and Leisa Perch. 2012. *Green Equity: Environmental Justice for Inclusive Growth: Policy Research Brief No.19*. Contribution of International Policy Center for Inclusive Growth.
- Our Common Future. 2022. <http://www.un-documents.net/ocf-a1.htm>. Accessed 31 May 2022).
- The Rio Declaration on Environment and Development 1992.

Shawkat Alam PhD is Professor of International and Environmental Law at Macquarie University, Sydney, Australia. He is the author of the monograph, *Sustainable Development and Free Trade* (Routledge, 2008), and has co-edited several books including *International Natural Resources Law, Investment and Sustainability* (Routledge, 2018), and *International Environmental Law and the Global South* (Cambridge, 2015). Professor Alam is an internationally recognised leading expert in trade and sustainable development. His work has contributed to institutional capacity building in developing economies to achieve sustainable development through legal, institutional and policy frameworks. He has received several awards including Vice-Chancellor's Award for Excellence in Higher Degree Research Supervision, Macquarie University. He has built strong international research collaborations that have led to significant community outreach projects, partnerships and research consultancies and leads a high-profile initiative to promote sustainable development and capacity building through various projects in South and South-East Asia, including Bangladesh, Indonesia, and Thailand.

S M Atia Naznin is a Sessional Lecturer at Macquarie Law School, Macquarie University, Australia. Her qualifications include a PhD in Law from Macquarie University, LLM from the University of Sydney, and LLM and LLB (Honours) from the University of Dhaka. She was a faculty of Law at Australian Catholic University, Australia, and BRAC University and Eastern University in Bangladesh. She worked as a Research Fellow and National Consultant at several international NGOs including UNDP, CIDA, and Article 19. She was also a visiting Research Fellow at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (University of Johannesburg, South Africa), and a Researcher at the Centre for Environmental Law (Macquarie University). Her research expertise lies in the areas of international law, human rights law, and comparative constitutional law. Dr. Naznin's doctoral thesis particularly examined the role of judicial remedies in implementing court orders in socioeconomic rights litigation. Her most recent publications include two chapters respectively published in books entitled *International Handbook of Disaster Research* (SpringerNature, 2022) and *Bangladesh and International Law* (Routledge, 2021).

Chapter 15

Towards a Constitutional Law Framework for Foreign Direct Investments and Intellectual Property Rights Reform: The Case of Bangladesh



Shima Zaman and Rumana Islam

Abstract When Bangladesh is moving towards a smooth transition from a least developed country to a developing country and aims to accomplish the global target of sustainable development goals by 2030, there are certain areas which need particular attention. This chapter focuses on two of such important areas: foreign direct investment (FDI) and intellectual property (IP), that directly contribute to escalating economic growth. It examines within the constitutional law framework what reforms need to be undertaken for FDI and IP law to meet the challenges for Bangladesh in fulfilling its target. The chapter investigates how (a) a normative framework for FDI can be developed based on the constitutional law framework; and (b) its bilateral investment treaties and international investment agreements becoming legal yardsticks for domestic law and policy regulating the FDI. It also (a) emphasises the recognition of IP law within the constitutional framework; and (b) explores the constitutional sources, limitations, and international obligations on the State to make IP law. Finally, it identifies the gaps and challenges of the legal regime of FDI and IP within the constitutional law framework of Bangladesh and recommends reforms required to address these gaps and challenges to meet the needs of time.

Keywords Constitutional law · Investment · Intellectual property rights · Sustainable development · Reforms · WTO · TRIPS agreement

15.1 Introduction

Bangladesh is moving towards a smooth transition from its least developed country (LDC) status to a developing country status. It aims to accomplish the global target of sustainable development goals (SDGs) by 2030. To achieve this target, Bangladesh

S. Zaman · R. Islam (✉)

Department of Law, University of Dhaka, Dhaka, Bangladesh

e-mail: zaman_shima@du.ac.bd; rumana.law@du.ac.bd

needs to pay attention to certain areas of economic importance. Two such important areas that directly contribute to escalating economic growth are foreign direct investment (FDI) and intellectual property (IP). This chapter examines these two areas within the constitutional framework of Bangladesh and their reforms needed to meet the challenges facing Bangladesh in fulfilling its target.

Part I of this chapter provides a contextual background of the FDI and IP rights in Bangladesh. Part II focuses on how a normative framework for FDI can be developed by analysing the constitutional law and how the bilateral investment treaties (BITs) and international investment agreements (IIAs) of Bangladesh become legal yardsticks for national law and policy regulating FDIs and performing a ‘quasi-constitutional’ function. Part III examines the recognition of intellectual property (IP) law within the constitutional framework of Bangladesh. The Constitution of Bangladesh does not openly declare IP as property. While this means that IP does not have special constitutional status, it also means that there are no constitutional restrictions on Bangladesh to make IP laws. The preamble of the Constitution emphasises economic liberty as one of the important liberties. Its articles 40 and 42 guarantee the citizens’ right to property which includes IP. Several fundamental principles of the constitutional state policy authorise state machineries to adopt laws to protect the interests of the farmers, indigenous people, national culture, and resources (arts 8, 13, 15, 16, 18A, 23, and 23A) which are connected to IP issues. Article 25 of the Constitution provides for international relations based on respect for international law and principles enunciated in the UN Charter. This part further explores the constitutional sources (and limitations) and international obligations on the State’s power to make IP law. Part IV concludes that the constitutional framework can serve as the normative basis for reforming the current legal regimes governing FDI and IP in Bangladesh.

15.2 Contextual Background of the Legal Regime of FDI in Bangladesh

For Bangladesh the journey of the last 50 years as an independent country has not been a smooth one. Its political history is clouded with several *coup d’états* and bloodshed. The disrupted political climate has significantly impacted its smooth growth in the first two decades of independence. However, there has been a turnaround over the last decade and its growth in economic development has been a remarkable success. The flow of FDIs over the last 5 years has been significant. Though there has been some setback due to the Covid-19 pandemic, Bangladesh has managed well to survive economically in this hard time. In 2015 Bangladesh upgraded itself to the World Bank’s (WB) ‘lower middle income’ country and in 2018 qualified for graduation from the LDC category to a developing country by

2024.¹ Bangladesh attracted an increased FDI flow of 67.94% according to UN Conference on Trade and Development (UNCTAD) World Investment Report (WIR) 2018 and became the second largest recipient of FDI in South Asia.² Bangladesh also enjoyed a steady GDP growth rate.³ It all got a setback when the world was hit by Covid-19 pandemic in 2020. The WB's Global Economic Prospects 2020 also projected that Bangladesh might have a drastic decline in its GDP in the coming year because of the predictable economic crisis due to the pandemic.⁴ Given this contextual background, this part examines how Bangladesh can benefit from its current constitutional framework for the promotion and protection of FDIs.

Bangladesh's first action to regulate its FDIs commenced in 1974 with the introduction of a new Investment Policy to restore certain rights and privileges to foreign investors.⁵ Bangladesh Investment Corporation was established in 1976, followed by the abolishment of investment ceiling for private industries in 1978. It enacted legislation to deal solely with foreign investors in 1980. The *Foreign Private Investment (Promotion and Protection) Act 1980* stipulated a more liberal attitude towards foreign investors.⁶ Without much modification it continues as the core piece of FDI legislation. However, one significant development took place in 2016 with the enactment of *Bangladesh Investment Development Authority (BIDA) Act 2016*,⁷ merging the previous Board of Investment (BOI) and Privatization Commission which dealt with FDIs. The sole aim of BIDA Act is to encourage investment in private sectors. In February 2018, BIDA launched the third edition of Bangladesh Investment Guide 2018, with the aim to expedite, support, and encourage foreign investors with proper guidance to understand the local legal system and investment

¹ IISD, 'Bangladesh, UN Consider Expected LDC Graduation in 2024' (IISD, 18 December 2018) <<https://sdg.iisd.org/news/bangladesh-un-consider-expected-ldc-graduation-in-2024/>> accessed 12 August 2020; Fahmida Khatun, 'LDC GRADUATION: What it means for Bangladesh' The Daily Star (Dhaka, 20 March 2018) <<https://www.thedailystar.net/opinion/macro-mirror/ldc-graduation-what-it-means-bangladesh-1550542>> accessed 12 August 2020.

² UNCTAD, *World Investment Report* (UNCTAD 2018) <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 12 August 2020; Niaz Mahmud, 'World Investment Report: Bangladesh second largest FDI recipient in South Asia' *Dhaka Tribune* (Dhaka, 24 June 2019) <<https://www.dhakatribune.com/business/economy/2019/06/24/report-bangladesh-tops-fdi-list-in-south-asia-in-2018>> accessed 12 August 2020; 'Bangladesh Foreign Direct Investment' (*Trading Economy* 2020) <<https://tradingeconomics.com/bangladesh/foreign-direct-investment>> accessed 12 August 2020.

³ <<https://tradingeconomics.com/bangladesh/gdp-growth>> accessed 12 August 2020.

⁴ World Bank, *Global Economic Prospects* (June 2020, Washington, DC) <<https://openknowledge.worldbank.org/handle/10986/33748>> and <<https://tbsnews.net/economy/world-bank-forecasts-only-16-gdp-growth-bangladesh-90592>> accessed 12 August 2020.

⁵ The New Investment Policy 1974 <<http://countrystudies.us/bangladesh/59.htm>> accessed 14 August 2020.

⁶ For the text, <<http://bdlaws.minlaw.gov.bd/act-597.html>> accessed 14 August 2020.

⁷ Text of the BIDA Act is available only in Bangla <<http://bdlaws.minlaw.gov.bd/act-1194.html>> accessed 14 August 2020.

environment which they might at times find alien.⁸ On 6 August 2020, BIDA came up with another new Investment Handbook providing guidelines to foreign investors.⁹ Bangladesh enacted *One Stop Service Act 2018* to foster FDIs and encourage and support all kind of services to investors.¹⁰ The One Stop Service Centre (OSSC), an online based service for foreign investors, started functioning from March 2020.¹¹ These set of national laws provides the legal framework for the protection, promotion, and regulation of FDIs in Bangladesh.¹²

At the international level, Bangladesh has concluded different international, regional, and bilateral treaties related to FDI to ensure in-coming foreign investors certain level of protection. It has signed various investment related instruments which aim to protect foreign investors and their investments and opened scope for investor-state dispute settlement (ISDS) in the event of any dispute with the host State. Bangladesh has ratified the World Bank's 1965 Convention on Settlement of Investment Disputes between States and Nationals of Other States for establishing the International Center for Settlement of Investment Disputes (ICSID)¹³ and 1985 Convention establishing the Multilateral Investment Guarantee Agency (MIGA),¹⁴ and the UN's 1958 Convention for Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹⁵ Keeping in tune with its international obligation, *Bangladesh Arbitration Act 2001* has been enacted for the recognition and enforcement of foreign arbitral awards (chap. X).¹⁶ Bangladesh is also a member some organisations which deal with some aspects of protection of FDIs, such as World Association for Investment Promotion Agency (WAIPA),¹⁷ World Intellectual Property Organization (WIPO)¹⁸ and the World Trade Organization (WTO).¹⁹ Bangladesh is also a party to some multilateral and regional treaties on trade and

⁸The Government Published a guideline for the foreign investors for investment in economic zones in 2017 <<https://www.beza.gov.bd/wp-content/uploads/2017/05/Investors-Guide.pdf>> accessed 14 August 2020.

⁹BIDA New Investment Handbook 2020 <<https://www.dhakatribune.com/business/2020/08/06/pm-work-hard-to-make-investment-atmosphere-more-attractive>> accessed 16 August 2020.

¹⁰BIDA (n 7).

¹¹<http://bida.gov.bd/?page_id=494> accessed 14 August 2020.

¹²ibid.; R Islam, 'Mapping the Investor State Dispute Settlement (ISDS) Regime of Bangladesh' in J Chaisse, L Choukroune and S Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer, Singapore, 2020) 2709.

¹³ICSID Convention <<https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview>> accessed 14 August 2020. Bangladesh ratified the Convention on 26 April 1980.

¹⁴<[https://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20\(April%202018\).pdf](https://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20(April%202018).pdf)> accessed 14 August 2020. Bangladesh ratified it in 1987.

¹⁵NY Convention <<http://www.newyorkconvention.org/english>> accessed 14 August 2020. Bangladesh ratified it on 6 May 1992.

¹⁶<http://www.mccibd.org/images/uploadimg/act_and_policy/corporate_governance/The-Arbitration-Act-2001.pdf> accessed 14 August 2020.

¹⁷WAIPA <<https://waipa.org>> accessed 14 August 2020.

¹⁸WIPO <<https://www.wipo.int/portal/en/index.html>> accessed 14 August 2020.

¹⁹WTO <<https://www.wto.org>> accessed 14 August 2020.

commerce having provisions on investment protection. Some of these TIPs include the UN Economic and Social Commission for Asia and Asia-Pacific Trade Agreement 2009 APTA),²⁰ South Asian Free Trade Area (SAFTA) Accord 2004,²¹ Bangladesh-EC Cooperation Agreement (2000),²² and OIC Investment Agreement 1981.²³

Bangladesh enacted the *Foreign Investment Act 1980* to keep in tune with the global South. It signed several BITs with developed countries to promote FDI flow, as BITs were typically seen to be the instruments that foreign investors liked to have for their protection.²⁴ The BIDA record shows that Bangladesh is now a party to 31 BITs,²⁵ while the Bangladesh Ministry of Industries shows a total of 33 BITs.²⁶

15.2.1 Constitutional Law Framework for the Protection and Promotion of FDI in Bangladesh

In examining the domestic legal regime of Bangladesh to protect FDIs, it is necessary to look at the normative framework for the investment law reforms that stem from the constitutional framework and how it regulates the relationship between the state and private foreign investors, and how this legal framework circumscribes the dispute settlement mechanism involving the review of governmental role and conduct. The basic principles that are universally recognised in any domestic

²⁰ It is yet to come into force. Its members are China, Republic of Korea, Lao People's Democratic Republic and Sri Lanka, <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2591/download>> accessed 14 August 2020.

²¹ Came into force on 1 January 2006. This is a trade agreement between all South Asian Association for Regional Cooperation (SARRC) countries (Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka), <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2671/download>> accessed 14 August 2020.

²² Cooperation Agreement Between the European Community and Bangladesh on Partnership and Development of 22 May 2000 came into force on 1 March 2001, <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download>> accessed 14 August 2020.

²³ OIC Investment Agreement <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download>> accessed 14 August 2020.

²⁴ On proliferation of BIT program, see S Jandhyala et al., 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55(6) *The Journal of Conflict Resolution* 1047–73; P Bekker and A Ogawa, 'The Impact of Bilateral Investment Treaty (BIT) Proliferation on Demand for Investment Insurance: Reassessing Political Risk Insurance After the "BIT Bang"' (2013) 28(2) *ICSID Review – Foreign Investment Law Journal* 314–50.

²⁵ BIDA <http://bida.gov.bd/?page_id=2552> accessed 14 August 2020. The Bangladesh-Belarus MOU on agriculture and food <<https://www.thedailystar.net/news-detail-235653>> accessed 14 August 2020 and an Agreement on Trade and Economic Cooperation <http://mfa.gov.by/en/press/news_mfa/e33df1a3af362d77.html> accessed 14 August 2020.

²⁶ Bangladesh Ministry of Industries <<https://moind.gov.bd/site/page/f7aa7575-5196-476b-907b-3ea65e885717/Bilateral-Agreements>> accessed 14 August 2020. The Bangladesh-Kuwait BIT of 4 May 2016.

constitutional law invariably comprises certain basic principles such as democracy, the rule of law, and human rights protection.

The *Foreigners Act 1946*²⁷ of Bangladesh deals with foreigners and defines a ‘foreigner’ to be any person who is not a citizen of Bangladesh. The framers of the Constitution took a very prudent and cautious move as to which fundamental rights guaranteed under the Constitution to be applied to foreigners. A careful reading of the constitution reveals that the fundamental rights incorporated in Part III of the Constitution uses the phrase either ‘any citizen’ or ‘any person’ so that these fundamental rights can be easily identifiable. However, the Constitution draws no difference between a foreigner and a citizen when it comes to fundamental rights.

Article 31 of the Constitution provides for right to the protection of law and ensures that such protection is accorded under the law which is inalienable right of every citizen as well as ‘every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law’. The right to life, a universally accepted fundamental rights, is understood to extend right to healthy environment. In a public interest litigation case, *Dr. M. Farooque v. Secretary, Ministry of Communication, Government of the People’s Republic of Bangladesh and Others*,²⁸ the Supreme Court of Bangladesh held that the constitutional ‘right to life’ extends to include right to a safe and healthy environment free from pollution.

The verbatim of article 31 is wide to protect FDIs in Bangladesh pursuant different fundamental rights, particularly the protection of law. Other fundamental rights available to foreigners are articles 32 (protection of right to life and personal liberty), article 33 (safeguards as to arrest and detention), and article 35 (protection in respect of trial and punishment). The enforcement of fundamental rights is guaranteed under article 44 of the Constitution. Article 26 ensures that any law inconsistent with the Constitution shall become void to the extent of its inconsistency. Section 83(1) of the Bangladesh Code of Civil Procedure (CPC) 1908²⁹ provides that a foreigner can sue in the courts of Bangladesh as if they were citizens of Bangladesh. This provision implies that the foreign investors can sue if any of their rights are violated, subject to certain exceptions. There is no specific embargo in the Bangladesh Code of Criminal Procedure (CrPC) 1898³⁰ that prevents a foreigner from filing a criminal case in the courts of Bangladesh. Anyone regardless of their nationality can file a criminal case or lodge a First Information Report (FIR) against a Bangladeshi national in the police station on the allegation of a criminal offence committed within the territory of Bangladesh. Similarly, if a foreigner commits a criminal offense in Bangladesh, a criminal case or a FIR can also be lodged against that foreigner. The Foreigners Act 1946 specifically provides rules and regulations

²⁷ <<http://bdlaws.minlaw.gov.bd/act-216/section-2720.html>> accessed 12 July 2022.

²⁸ (1997) 17 BLD (AD) 1–33.

²⁹ *Laws of Bangladesh*, <<http://bdlaws.minlaw.gov.bd/act-86.html>> accessed 6 June 2022.

³⁰ *ibid.*

that foreign nationals must comply with the local laws during their stay in Bangladesh.

The fundamental principles of state policy (FPSP) under the Constitution of Bangladesh ensure certain standards which are directly related to foreign investors and the operation of FDIs in Bangladesh. FPSP include article 11 (democracy and human rights), article 13 (principle of ownership), article 15 (provision for necessities), article 18 (public health and morality), article 18A (protection and improvement of environment and biodiversity), article 23 (national culture), article 23A (tribal cultures, minor races, ethnic sects and communities), article 24 (protection of national monuments), and article 25 (promotion of international peace, security and solidarity). Though FPSP are judicially unenforceable, they, these FPSP are fundamental to achieving SGDs, national governance, lawmaking, and policies within the broader interpretation of the Constitution pursuant to its article 8 and impose responsibilities on Bangladesh to oversee that the FDIs operating in Bangladesh do not conflict with its FPSP.

The commitment towards democracy and human rights ensures FDIs and foreign investor's accountability and transparency in their actions. The commitment for public health and protection of the environment and biodiversity, tribal cultures and ethnic communities creates responsibility for the government and responsible regulatory bodies that FDIs operating in Bangladesh and their foreign investors respect these constitutional commitments. The apex judiciary of Bangladesh on several occasions have rendered the possibility of enforcing these FPSP for the protection of the environment and achieving social justice.³¹ In dealing with the PIL cases, the judiciary has addressed different issues on the environment which directly relates to the basic necessities of living and human rights, such as water pollution, degradation of marine and coastal resources, loss of coastal habitats and deforestation, land-based pollution, water logging, and air pollution. Therefore, any national policy on FDIs in Bangladesh requires that these FPSP provide positive directions as given by the apex court. There should be specific obligations on foreign investors to endeavor their FDIs do not conflict with FPSP under the Constitution.

These are the major protections accorded in the domestic laws of Bangladesh. The broadly accepted and guaranteed constitutional rights and FPSP for nationals and non-nationals can be useful in understanding a balanced interpretation of investment treaties. Such a legal framework can also structure the current ongoing global investment law reform agenda which emphasises more on the contemporary challenging issues including the protection of human rights, the environment, IP rights, indigenous rights, and sustainable development – a sharp deviation from the old generation of BITs which focused only to protect the interest of foreign investors and their FDIs. These basic constitutional law guarantees encourage the regulatory space for the host country to take measures for greater public interest and policy, ensure transparent procedures of ISDS and protect the pressing issues mentioned.

³¹ Ridwanul Hoque, 'Taking justice seriously: judicial public interest and constitutional activism in Bangladesh' (2006) 15(4) *Contemporary South Asia* 399–422.

Such constitutional framework also ensures the accountability of Bangladesh as a host state under the principle of rule of law and deter it from any arbitrary or discriminatory measures constituting indirect expropriation.³² Article 6 of Bangladesh-Turkey BIT (2012) states, '[n]on-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation'.³³ Such BIT regulations would not constitute an indirect expropriation as they provide exception to certain investment protection standards committed under a BIT'. Such exceptions provide a qualifying investment protection standard in BITs and allow space for host countries' regulatory freedom and avoid any claim of indirect expropriation.

15.2.2 *FDIs and Sustainable Development*

The principle of sustainable development, as devised and conceptualised by the Brundtland Commission as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' affords guidance for investment law reforms. The principle requires an important reconceptualisation, which needs to be incorporated in law and policy to understand the role of FDIs as a tool for development for developing countries in a manner that sustains FDI-induced development for generations to come. Thus, the principle of sustainable development is useful to reform investment law by making concrete formulations of investment treaties for host countries. Indeed, Bangladesh has adopted a national sustainability policy to fulfil the SGD target by 2030,³⁴ including the National Sustainable Development Strategy (NSDS) (2010–2021)³⁵ and National Environmental Policy 2018.³⁶

These initiatives at the policy level are significant in the context of FDI and it is also necessary considering the importance the UN and its members, particularly Bangladesh, has attributed to increased FDIs for achieving the UN Millennium Development Goals and countries' development. NSDS emphasises sustainable economic growth and prescribes policies for certain sectors where FDIs play a crucial role for sustainable development in Bangladesh. These sectors include

³² Prabhash Ranjan, 'COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence?' (2020) 13(1) *Contemporary Asia Arbitration Journal* 205–28; Rachel Nathanson, 'The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post-Nykom: A Spanish Case Analysis' (2012–13) 98 *Iowa Law Review* 863.

³³ <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/274/download>> accessed 14 July 2022.

³⁴ <<https://sdgs.un.org/2030agenda>> accessed 12 July 2022.

³⁵ <<http://nda.erd.gov.bd/en/c/publication/national-sustainable-development-strategy-nsds-2010-2021>> accessed 12 July 2022.

³⁶ <<https://bangladeshbiosafety.org/bangladesh-doc/national-environment-policy-2018/>> accessed 12 July 2022.

natural gas, renewable energy, power sector, coal sector, industry, and transport. NSDS also emphasises urban environment addressing issues like slum settlement, pollution management, water supply, and sanitation. These national policies must be read together with the constitutional framework while implementing FDI operations in Bangladesh. The adoption of a national policy on FDIs in Bangladesh should combine the basic rights and FPSP incorporated in the Constitution to achieve sustainable development goals.

The role of investment law must consist of fostering the political stability needed for domestic and foreign investors to engage in growth-oriented economic activity without hampering the pursuance of competing public interest concerns. In recent years, Bangladesh has demonstrated political stability which has encouraged foreign investors to invest with great sense of security and enthusiasm. The principle of SDG is significant as this also demands that foreign investors and FDIs are subject to some stringent and effective regulation at both domestic and international level to ensure that the environment, human rights, community interests, and social values are respected. For the future, Bangladesh needs to adopt balanced policies for BITs to include its national and public interest issues, such as exclusion of measures relating to taxation for prudential reasons, promote sustainable economic development, protection of public health and the environment, measures for public morals, protection of international obligations, protection of human, labor and, indigenous rights, maintenance of national and international peace, and protection of national treasures of artistic, historic, or archeological value, and conservation of exhaustible natural resources, measures to address pandemics and emergency situations.³⁷

15.3 Contextual Background of the Legal Regime of IP in Bangladesh

IP rights confer an exclusive right to the inventor/creator/ assignee to fully utilise his/her invention/creation for a given period. IP right, once registered, is a tool to protect time, money, and effort invested by the inventor/creator of an IP. The laws and administrative procedures relating to IP rights are rooted in British India. The Patents, Designs and Trademarks Act 1883 is the earliest legislation on IP. This law was repealed by the enactment of the Patents and Designs Act in 1911 and the Trademarks Act in 1940. Copyright law was first introduced in 1914 which continued till 1962. Bangladesh has enacted its Patents Act in 2022, the Trademarks Ordinance in 2008, and the Trademarks Act in 2009. Its existing Copyright Act was enacted in 2000 and amended in 2005. Geographical Indication Act was enacted in 2013.

Bangladesh became a member of the World Intellectual Property Organization (WIPO) on 11 May 1985 and WIPO administered different IP related international

³⁷ Islam (n 12).

conventions and treaties. Bangladesh is a party to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) that sets compulsory and common standards of protection systems for all WTO members. As a signatory to the TRIPS Agreement, Bangladesh, in compliance with the TRIPS minimum standard, has enacted/ modified the existing IP laws amid continuing tension between developing countries/LDCs and developed countries. Developed countries, being the exporters of technologies, insist for strong IP protection and developing countries/LDCs, being the importers of technologies, opt for weaker IP protection considering its negative impact on human rights implementation especially in relation to right to health, food, and biodiversity.³⁸

From a constitutional viewpoint, the questions are: Are IP rights fundamental rights? If so, what is the basis of these rights? Do the fundamental principles of state policy, constitutional rights, and human rights affect the protection of IP rights? Is it possible to maintain a balance between IP rights and constitutional human rights of the citizens? This part considers these issues from two aspects (i) the recognition of IP rights by the Constitution of Bangladesh, and (ii) the constitutional sources of IP protection and constitutional limitations on legislative powers to enact IP laws, and the consistence/inconsistencies of IP laws with the Constitution.

15.3.1 *IP Rights as Fundamental Human Rights*

Respect and desire to uphold human rights are deep-rooted in the history of Bangladesh. The constitutional obligation to secure the fundamental human rights are reflected in the preamble of the Constitution, which asserts that the ‘fundamental aim of the state’ is the establishment of a society where fundamental human rights and freedoms are secured for all citizens.³⁹ This pledge has been further reiterated in the Constitution imposing a duty on the state to guarantee fundamental human rights as one of the fundamental principles of state policy in article 11 of the Constitution.⁴⁰ The constitutional human rights provisions were incorporated perhaps because of the influence of the existence of the International Bill of Rights.⁴¹ In recognising IP rights as human rights, UDHR states that ‘[e]veryone has the right

³⁸Daniel Chow and Edward Lee, *International Intellectual Property Law* (West Academic Publishing 2012) 1–15.

³⁹The preamble pledges ‘that it shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens’.

⁴⁰Art 11 provides that ‘The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed’.

⁴¹Muhammad Ekramul Haque, *The Bangladesh Constitutional Framework and Human Rights* (2011) 22(1) *Dhaka University Law Journal* 1. Bill of rights refers to the Universal Declaration of Human Rights, 1948 (UDHR), International Covenant on Civil and Political Rights, 1966 (ICCPR), and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).

freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits' and that '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' (art 27). These rights are further emphasised by ICESCR (art 15), ICCPR (art 19), and other international and regional instruments.⁴²

The Bangladesh Constitution does not provide special recognition and protection to IP rights. However, IP as a form of property comes within the purview of article 42 dealing with property and may claim legal recognition and protection.⁴³ Article 42 of the Constitution guarantees the rights of every citizen in acquiring, holding property, and having interest in any such property. Though the term property is not specifically defined in article 42, article 152 (c) defines the term 'property' to include property of every description – movable or immovable, corporeal or incorporeal, and commercial and industrial undertakings, and any right or interest in any such property or undertaking. Thus, within the general definition of 'property' under article 152, 'property' produced through creative thoughts can be included and therefore patents, trademarks, copyrights, and other IP rights become properties under the Constitution.

There is also no express IP clause in the Indian Constitution, but the Supreme Court of India in the *K.T. Plantations v. State of Karnataka* ruling held that intellectual property enjoys a high degree of protection in the following words: 'The expression 'Property' in Article 300A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognized by law'.⁴⁴ The text of article 152(c) of the Bangladesh Constitution neither expressly contains an IP clause, nor does it prohibit the creation and protection of IP rights. This means that there are no constitutional restrictions on making IP laws. The protection of IP ownership as a fundamental right adds another layer of security for IP right owners. Thus, extending constitutional protection to IP as a human right under the concept of right to 'property' and through legislative actions in Bangladesh is consistent with its Constitution.

⁴²The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and entered into force 3 September 1953, as amended by Protocol Nos 11 and 14 (entered into force 1 November 1998 and 1 June 2010) 213 UNTS 222 and art 17(2) of the Charter of Fundamental Rights of the European Union [2010] OJ C83/389.

⁴³Article 42 of the Constitution of Bangladesh maintains: '(1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law.'

⁴⁴(2011) 9 SCC 01.

15.3.2 *The Constitutional Sources of Legislative Power to Enact IP Law*

Article 149 of the Bangladesh Constitution plays an important role in protecting IP laws as it mandates the recognition of the pre-constitutional law subject to certain limitations mentioned in the provision. It states that '[s]ubject to the provisions of this Constitution all existing laws shall continue to have effect....' Article 65 authorises Parliament to make laws, followed by articles 145 and 145A authorising the executive to make contract or formalities regarding international treaties along with an obligation to place such instrument before Parliament. This requirement of placement before Parliament is a mere formality as Parliament does not need to determine the validity of the treaty.⁴⁵ Being a dualist state, Bangladesh does not recognise international law as a part of its domestic *corpus juris*. Therefore, international law must be transformed into domestic law through Parliament to apply international law in the domestic context. In *Ershad v Bangladesh and Others*, the Appellate Division of the Supreme Court of Bangladesh (AD) held that '[a]lthough universal human rights norms, whether given in the UDHR or in the Covenants, are not directly enforceable in national courts, they are enforceable by domestic courts if such norms are incorporated into the domestic law'.⁴⁶ Similarly in *BNWLA v Government of Bangladesh and Others*, the High Court Division of the Supreme Court of Bangladesh (HCD) declined to 'enforce those Covenants as Treaties and Conventions even if ratified by the State, as they are not part of the corpus juris of the State unless those are incorporated in the municipal legislation'.⁴⁷

The commitment of Bangladesh to perform international obligations has been affirmed by its Proclamation of Independence 1971. Article 25 of the Constitution also provides that 'Bangladesh shall base its international relations on the principles of respect for international law and principles enunciated in the United Nations Charter'. The courts in Bangladesh generally respect this constitutional obligation. The HCD in *BNWLA v Government of Bangladesh and Others* decided that 'where there is a gap in the municipal law in addressing any issue, the courts may take recourse to international conventions and protocols on that issue for the purpose of formulating effective directives and guidelines to be followed by all concerned until national legislature enacts laws in this regard'.⁴⁸ In *Ershad v Bangladesh and Others*, the AD while emphasising on the incorporation of international treaties within the legal system of Bangladesh opined that 'the national court should not straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon principles incorporated in the international treaties'.⁴⁹ The courts

⁴⁵ Mahmudul Islam, *Constitutional Law of Bangladesh* (Mullick Brothers, Dhaka 2012) 1026.

⁴⁶ (2001) 21 BLD (AD) 69.

⁴⁷ (2009) 14 BLC 703 [45].

⁴⁸ (2011) 31 BLD (HCD) 324.

⁴⁹ *Ershad v Bangladesh* (n 46).

can take help of international law to address the gap of domestic law if it is consistent with domestic law or the Constitution.⁵⁰

15.3.3 Possible Limitations on the Legislative Powers to Make IP Laws

Legislative power to make and implement IP laws is subject to several limitations of which some are constitutional, and others are rooted in international treaties. The Constitution is the supreme law of Bangladesh and any law inconsistent with the Constitution is void to the extent of inconsistency (art 7(2)). Part II of the Bangladesh Constitution states the FPSP which create an obligation on Bangladesh to consider these policies while making laws or taking any development project or policy (art 8(2)). However, the unenforceability of these FPSP does not authorise Bangladesh to ignore the implementation of these policies.⁵¹ The obligations under the FPSP include the state responsibility to ensure food, housing, health, education, economic, and social development for the citizens. IP law can both positively and negatively impact these human rights. Consequently, it may be argued that the FPSP in some cases may pose threat to making IP laws in Bangladesh. Courts as the guardian of the Constitution can interfere in the enactment of any law which is inconsistent with constitutional provisions and spirit.

The TRIPS Agreement provides scope for limiting the enjoyment and implementation of IP rights on the grounds of public policy and human rights. The adoption of limitations and exceptions to exclusive rights across different fields of IP are subject to the so-called 'three-step test' in that limitations/exceptions (i) should be imposed only in special cases, (ii) must not be 'conflicting with normal exploitation of the work'; and (iii) should not 'prejudice the legitimate interests of the right holders'.⁵² According to the TRIPS provisions, limitation/exception to exclusive rights in certain special cases (art 13), or limited exceptions (arts 17, 26(2) and 30), the prohibition of a 'conflict' or 'unreasonable conflict' with a 'normal exploitation' the prohibition of an 'unreasonable prejudice' (arts 13, 26 and 30) to 'legitimate interests' of IP owners (arts 13, 17, 26(2) and 30) and third parties (arts 17, 26(2) and 30) are the general guidelines for national policymakers seeking to reconcile IP protection with other societal needs.

In addition, the WTO Dispute Settlement Body (DSB) on several occasions refused to extend IP protection under the provisions of articles 7 and 8 of the TRIPS

⁵⁰ M Shah Alam, 'Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study' (2006) 53(3) *Netherlands International Law Review* 399, 425.

⁵¹ *Masdar Hossain v Bangladesh* (1998) 13 BLD (HCD) 558 (Md Mozammel Hoque J).

⁵² The three-step test was first established in relation to the exclusive right of reproduction in article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works 1967 and subsequently modified by the TRIPS Agreement (art 13), WIPO Copyright Treaty (art 10), and WIPO Performances and Phonograms Treaty (art 16(2)).

Agreement.⁵³ The Panel and Appellate Body in a recent dispute concerning plain packaging of tobacco products referred to the principles of the TRIPS Agreement to deny the extension of trademark rights to positive uses of the mark.⁵⁴ The rationale for exceptions/exceptions is due to the consequences of the TRIPS Agreement. Whilst such protection may provide impetus for more advancement in technology, at the same time absolute protection to intellectual work can be detrimental to further progress of humanity. To balance the rights of the IP right holders and the society, certain limitations are common in IPR statutes around the globe.⁵⁵

15.4 Conclusion

This chapter has elaborated the constitutional framework to understand the regulation, promotion, and protection of FDIs and IP rights in Bangladesh. The discussion on FDI has shown that constitutional analysis (at a domestic, and international level) can serve as the normative basis for reforming the current investment regulatory law in a way that results in a comprehensive, balanced, predictable, and broadly consented global regime which would take into account the right of Bangladesh as a host country to regulate its own policy space for its public interest concerns like human rights and the environment and at the same time ensure its target of achieving the SGDs. Irrespective of the absence of direct reference to IP law in the Constitution, IP rights are recognised and protected under the constitutional provisions and international treaties in Bangladesh. The government has the constitutional mandate to enact IP laws within the restriction of the FPSP provisions. In response to article 25 of the Constitution, the government has modified and/or enacted provisions of different IP laws, keeping pace with the TRIPS Agreement.

Bangladesh is committed both at the national and international level to protect, regulate, and promote both FDIs and IP rights as per international standards. It must always strive for a balanced regime that protects the competing interest of FDI and IP importing and exporting countries. Reciprocally, both in-bound FDIs and IPs must cater for ensuring the public interest and policy space for Bangladesh as a host country. Such a balanced win-win regulatory approach would continue to provide a

⁵³ According to TRIPS art 7, the protection and enforcement of intellectual property rights should contribute ... to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. TRIPS art 8 recognises the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.

⁵⁴ *Australia – Certain Measures concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R WT/DS441/AB/R, AB Report of 9 June 2020.

⁵⁵ Ravindra Bhat, 'Innovation and Intellectual Property Rights law – An Overview of the Indian Law', *Syndicate of the Press of Cambridge University v. B.D. Bhandari*, 2011 Division Bench, Delhi High Court) (2018) 30(1) *IIMB Management Review* 51–61, 52.

comprehensive, balanced, and predictable legal regime of Bangladesh for the regulation, promotion, and protection of FDIs and IP rights in its domestic jurisdiction in compliance with its constitutional framework.

References

Books

- Boyle, James, and Jennifer Jenkins. 2021. *Intellectual Property: Law & the Information Society Cases and Materials*. Independently Published.
- Chow, Daniel C.K., and Edward Lee. 2012. *International Intellectual Property Law*. St. Paul: West Academic Publishing.
- Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. Dhaka: Mullick Brothers.

Chapter in Edited Book

- Islam, Rumana. 2020. Mapping the Investor State Dispute Settlement (ISDS) Regime of Bangladesh. In *Handbook of International Investment Law and Policy*, ed. J. Chaisse, L. Choukroune, and S. Jusoh, 2. Singapore: Springer.

Articles

- Alam, M. Shah. 2006. Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study. *Netherlands International Law Review* 53 (3): 399–425.
- Bekker, P., and A. Ogawa. 2013. The Impact of Bilateral Investment Treaty (Bit) Proliferation on Demand for Investment Insurance: Reassessing Political Risk Insurance After the “Bit Bang”. *ICSID Review – Foreign Investment Law Journal* 28 (2): 314–350.
- Bhat, Justice S. Ravindra. 2017. Innovation and Intellectual Property Rights law – An Overview of the Indian Law. *IIMB Management Review* 30: 51–61.
- Haque, Muhammad Ekramul. 2011. The Bangladesh Constitutional Framework and Human Rights. *Dhaka University Law Journal* 22 (1): 1.
- Hoque, Ridwanul. 2006. Taking justice seriously: judicial public interest and constitutional activism in Bangladesh. *Contemporary South Asia* 15 (4): 399–422.
- Jandhyala, S., et al. 2011. Three Waves of BITs: The Global Diffusion of Foreign Investment Policy. *The Journal of Conflict Resolution* 55 (6): 1047–1073.
- Khalil, M.I. 1992. Treatment of Foreign Investment in Bilateral Investment Treaties. *ICSID Law Review* 8: 339.
- Nathanson, Rachel A. 2012–13. The Revocation of Clean-Energy Investment Economic-Support Systems as Indirect Expropriation Post-Nycomb: A Spanish Case Analysis. *Iowa Law Review* 98: 863.
- Ranjan, Prabhash. 2020. COVID-19, India and Indirect Expropriation: Is the Police Powers Doctrine a Reliable Defence? *Contemporary Asia Arbitration Journal* 13 (1): 205–228.
- Vandeveld, K.J. 1998. The Political Economy of a Bilateral Investment Treaty. *The American Journal of International Law* 92 (4): 621.

Documents

The European Convention for the Protection of Human Rights and Fundamental Freedoms. (opened for signature 4 November 1950, entered into force 3 September 1953 213 UNTS 222.
 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights., Apr. 15, 1994,
 Marrakesh Agreement Establishing the World Trade Organization (1994) 33 ILM 1197.
 UNCTAD. 2018. *World Investment Report* (UNCTAD 2018).
 World Bank. 2020. *Global Economic Prospects* (June 2020, Washington, DC).

Internet Source

Fahmida Khatun. 2018. LDC GRADUATION: What it means for Bangladesh. *The Daily Star* (Dhaka, 20 March 2018). <https://www.thedailystar.net/opinion/macro-mirror/ldc-graduation-what-it-means-bangladesh-1550542>. Accessed 12 Aug 2020.

Shima Zaman is a Professor of Law at the University of Dhaka and previously worked at the Department of Law, University of Chittagong, Bangladesh. She received her LLB and LLM from the University of Dhaka followed by an LLM in Intellectual Property Law in 1999 from George Washington University, Washington DC; and PhD in international trade law from Macquarie University Australia in 2012. She is also acting as an advisor at the Department of Law, East West University and an adjunct faculty in the North South University. She is involved with a renowned NGO working on land reform and land right issues in Bangladesh. As an executive member of the organisation, she has to participate in policy dialogue with government, national and international bodies, and also with civil society. She worked as a consultant and prepared research report on land rights of the people of Bangladesh under a project funded by the World Bank; conducted research on ADR in Bangladesh with fund from Canadian CIDA; and researched on the Cooperative Societies Laws with fund from an NGO.

Rumana Islam is a Professor of Law at the University of Dhaka. Currently she holds the position of Commissioner at Bangladesh Securities and Exchange Commission (BSEC). She was nominated as a Panel Arbitrator designated by the Government of Bangladesh to the World Bank's International Centre for Settlement of Investment Disputes (ICSID) in April 2021. She completed her LLB (Hons) and LLM from the University of Dhaka with first class in both; another LLM (specialisation in commercial law) from University of Cambridge with a Cambridge Commonwealth Trust Bursary in 2006; and PhD from University of Warwick in 2015 with Commonwealth Scholarship. During her PhD she also obtained Charles Wallace Bangladesh Trust Doctoral Bursary, 2013. Her seminal work on the Fair and Equitable Treatment (FET) standard has been published as a book titled as *Fair and Equitable Treatment in International Investment Arbitration: Developing Countries in Context* (Springer, 2018). She has published journal articles on various issues in home and abroad. She has acted as the Assistant Director of Research (Law) in Bangladesh Institute for Law and International Affairs, the leading thinktank of law in the country from September 2015 to September 2019.

Chapter 16

Refugee Protection Under the Constitution of Bangladesh: The Rohingya Refugees in Context



Jobair Alam

Abstract This chapter critically examines the scope of refugee protection in the Constitution of Bangladesh and applies that framework to the Rohingya refugees in Bangladesh to see if the constitutional provisions are adequate to ensure the three important aspects of protection: (1) refugee status, (2) refugee rights, and (3) solution to the refugeehood by consolidating the permanent methods with a particular emphasis on local integration. Finally, it provides some recommendations to overcome the challenges associated with ensuring the constitutional means of refugee protection in Bangladesh. The significance of this chapter lies in unveiling a Constitution's propensity to refugee protection in contradiction to insular national politics and other associated impasses which often gainsay the legitimate claim of these vulnerable groups of human being.

Keywords Refugee protection · Constitution of Bangladesh · Rohingya · Local integration

16.1 Introduction

A refugee is a person unable or unwilling to return to their country of origin owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion.¹ Protection for the refugees is globally ensured through two international instruments: the 1951 Refugee Convention and its 1967 Protocol. Some of the provisions of these treaties, notably the principle of non-refoulement (not returnable) under article 33(1) of the 1951 Convention, attained the status of customary international law. Besides many

¹ Convention Relating to the Status of Refugees 1951 189 UNTS 137, art 1 (A) (2).

J. Alam (✉)

Department of Law, University of Dhaka, Dhaka, Bangladesh

e-mail: jobairalam@ymail.com

national laws, there are also different regional mechanisms for the regulation and protection of refugees, such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969. Despite these instruments, the rights and protection of the refugees are in constant danger of violation which simultaneously threatens global security, promotes pushback diplomacy, and eventually creates strife among states.

The Rohingya crisis in Bangladesh dates back to the last century. Bangladesh has always extended its humanitarian hands to the Rohingya, however there is no specific national framework dedicated for their protection till date. Despite being a member of the UN High Commissioner for Refugee (UNHCR) Executive Committee, Bangladesh is not a party to the 1951 Convention or its 1967 Protocol. When a state is a non-party to the refugee convention, it might not feel obligated to provide adequate protection to the refugees, and the administrative whim of the government in question or insular national politics might jeopardise their human rights. The risk is greater where the state in question is dualist in nature like Bangladesh. Accordingly, some national instruments for example, the Constitution or legislation, can best provide the protection for the refugees.

After an evaluation of the concept of refugee protection through constitutions, this chapter critically examines the scope of refugee protection in the Constitution of Bangladesh and applies that framework to the Rohingya refugees in Bangladesh to see if these provisions are adequate to ensure three important aspects of protection: refugee status, refugee rights, and solution to the refugeehood by consolidating the permanent methods with a particular emphasis on local integration. Finally, it provides some recommendations to overcome the challenges associated with ensuring the constitutional means of refugee protection in Bangladesh. The significance of this chapter lies in unveiling a Constitution's propensity to refugee protection in contradiction to insular national politics and other associated impasses which often gainsay the legitimate claim of these vulnerable groups of people.

16.2 Refugee Protection

In refugee context, the term “protection” refers to all activities aiming to achieve full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee, and international humanitarian law. Protection also involves creating an environment conducive to preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring human dignity through socio-economic, political, and other steps. International cooperation is particularly important when countries, especially developing country, like Bangladesh is called upon to host large numbers of refugees for long periods of time, without necessarily having sufficient resources.²

²Frances Nicholson and Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No 27* (Inter-Parliamentary Union and UNHCR 2017) 34, 261.

Such protection may be ensured by the host-state or UNHCR, preferably in collaboration. States have individual and collective responsibilities in this regard, as 'UNHCR's Executive Committee has stressed that respect for human rights and humanitarian principles is a responsibility for all members of the international community'.³

Refugee protection in the contemporary scholarship accentuates the arrangement of a conducive environment that goes beyond mere respecting the refugee rights and argues for ending their ordeals through any permanent ways or methods. Thus, in a strict sense any protection of the refugee must include either of the three major components: (1) refugee status to describe and ensure their relation to the state, the organs of the state, and other persons; (2) refugee rights to live with human dignity; and (3) solutions to refugeehood, such as voluntary repatriation, local integration, or resettlement to start their life anew.

16.3 Refugee Protection Through Constitutional Provisions

'People do not always agree on what the Constitution means or indeed, even understand what it says, but they generally agree that the Constitution should be obeyed.'⁴ But when it comes to the protection mechanism of constitutions, the most popular theory is the social contract theory and right-based approach. Social contract theory views that persons' political and/or moral obligations are contingent upon a contract or an agreement among them to form the society in which they live.⁵ According to Hobbes, the justification for political obligation is this: given that men are naturally self-interested, yet they are rational, they will choose to submit to the authority of a sovereign in order to be able to live in a civil society, which is conducive to their own interests.⁶ On the other hand, Locke's *Second Treatise on Government*⁷ offering a set of deductions modifying Hobbes' model is at best a parallel theory reaching a more benign conclusion regarding society as they are based on a more benign assumptions about the people who comprised it to have their rights better protected in contrast to the others who are not a part of the same society.⁸

³Executive Committee of the High Commissioner's Programme, *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations No. 100 (LV) – 2004* (2004) <<https://www.refworld.org/docid/41751fd82.html>> accessed 27 December 2021.

⁴Paul Lermack, 'The Constitution Is the Social Contract So It Must Be a Contract ... Right? A Critique of Originalism as Interpretive Method' (2007) 33 (4) *William Mitchell Law Review* 1426–27.

⁵Internet Encyclopedia of Philosophy, *Social Contract Theory* <<https://iep.utm.edu/soc-cont/>> accessed 28 December 2021.

⁶*ibid.*

⁷John Locke, *Second Treatise on Government* (Peardon ed., Liberal Arts Press 1952).

⁸Lermack (n 4) 1403–43.

According to Hobbes' theory, refugee rights cannot be protected through the constitution because the constitution functions as an agreement between the state and its citizens only, so naturally the non-citizen refugees fall out of the ambit. However, such a proposition is misconstrued, as refugee protection can indeed be ensured through constitution as many states recognise the right to seek and enjoy asylum in their constitutions in different ways.⁹ Some states conferring the right on the individual or as an obligation on the state itself recognise the right to seek and enjoy asylum. On the other hand, the constitutions of some states make the right to seek and enjoy asylum contingent upon 'laws and regulations in force', consequentially providing the legislature the discretion to determine the content of such right.

However, some constitutions specify the right to seek and enjoy asylum in an elaborate manner. For instance, several constitutions define the right to seek and enjoy asylum adopting the language of the 1951 Refugee Convention itself; while others enshrine the right in terms of persons facing persecution on account of their measures in national liberation, human rights and/or fundamental freedoms and defense of democracy.¹⁰ Some constitutions stipulate more generally that asylum is to be granted in accordance with international rules and treaties, thus includes obligations under the 1951 Convention and international customary law standards.¹¹ There are also constitutions that do not explicitly recognise a right to asylum, they indirectly do so by declaring that the UDHR is applicable or by referring to regional human rights obligations, as in Benin.¹² Any lawful asylum seeker may be protected under the constitution because not all human rights incorporated are only applicable to citizens.

Despite different forms, to ensure the refugee protection, a national constitution needs to respond to the basic needs of the refugees including their status, rights, and solutions to the refugeehood. Refugee Status Determination (RSD) is the legal or administrative process by which governments or UNHCR determine whether a person seeking international protection is considered a refugee under international, regional, or national law.¹³ States have the primary responsibility to conduct RSD, however UNHCR may conduct RSD under its mandate when a state is not a party to the 1951 Refugee Convention and/or does not have a fair and efficient national asylum procedure in place.¹⁴ RSD is often a vital process in helping refugees realize

⁹ Nicholson and Kumin (n 2) 28.

¹⁰ *ibid.* 29.

¹¹ *ibid.*

¹² *ibid.*

¹³ UNHCR, 'Refugee Status Determination' <<https://www.unhcr.org/refugee-status-determination.html>> accessed 26 December 2021.

¹⁴ *ibid.*

their rights under international law and places the refugees in a privileged position compared to those who lack the official status of refugee.¹⁵

While refugees have obligations to comply with existing laws and regulations towards their host country,¹⁶ they are also entitled to different rights. Some of these rights apply to all asylum seekers, some apply after an official asylum application has been made, some rights apply once refugee status has been granted and some rights are only applicable after a certain period of residence.¹⁷ But in all cases, general human rights law applies to all refugees, which are also recognised under the 1951 Convention: right to education, right to health and right to medical treatment. Further under the 1951 Convention, from the moment of application for refugee status, lawful asylum-seekers and refugees become entitled to right to self-employment (art 18) and right to choose residence and freedom of movement within the territory (art 26) and in case of habitual residence they are entitled to other rights.¹⁸

A state may decide not to provide temporary protection to the refugees and seek to durable solution to refugeehood. Durable solutions are achieved when refugees can enjoy a secure legal status that assures them access to their rights on a lasting basis,¹⁹ for example voluntary repatriation, naturalisation, or resettlement. The foundation of all durable solutions is the inclusion of refugees in national systems and services which can be supplemented, if needed, by support from the international community.²⁰

16.4 The Scope of The Rohingya Refugee Protection in the Constitution of Bangladesh

Bangladesh ever observant to the principle of *non-refoulement*, has an extensive record of humanitarian actions taken and obligations executed in relation to refugees within its territories. Considering that Bangladesh is a non-party to the Refugee Convention and its Protocol, the point is if the constitutional provisions could be extended to ensure the refugee status, rights, and solutions to the Rohingya refugees in Bangladesh.

¹⁵ Bernadette Ludwig, *Wiping the Refugee Dust from My Feet: Advantages and Burdens of Refugee Status and the Refugee Label* (John Wiley & Sons Ltd. 2016) 5.

¹⁶ Convention Relating to the Status of Refugees 1951 (entered into force April 22, 1954) 189 UNTS 150, art 2.

¹⁷ Hilary Evans Cameron, 'Refugee Status Determinations and the Limits of Memory' (2010) 22 (4) *International Journal of Refugee Law* 469–511.

¹⁸ For example, artistic and patent rights (art 14).

¹⁹ Nicholson and Kumin (n 2) 228.

²⁰ *ibid.* 229.

16.4.1 *Refugee Status of the Rohingya in the Constitution of Bangladesh*

Bangladesh does not have any direct provision in its Constitution for RSD, although the same could be found in the broader interpretation of the constitutional provisions. In its preamble, the Constitution emphasises on full contribution towards international peace and co-operation, while article 25 states about showing respect for the principles including the principles of international law enumerated in the UN Charter. The Appellate Division of the Supreme Court of Bangladesh (AD) has applied principles of international law in interpreting provisions relating to fundamental rights. In *HM Ershad v Bangladesh and others*, the Court held that ‘if the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instrument’.²¹

As Bangladesh lacks a domestic legal framework for RSD, relevant international law can be applicable for the determination. As such, the principles of the 1951 Convention can shape RSD and the framework of refugee protection in Bangladesh. In many instances, the Supreme Court of Bangladesh has taken the aid of international law to interpret legal provisions.²² For example, in the *RMMRU v. Bangladesh*,²³ the High Court Division of the Supreme Court of Bangladesh (HCD) relied on the customary international law principle of non-refoulement. Moreover, the Bangladesh government and UNHCR signed a Memorandum of Understanding (MOU) in 1993 according to which, Bangladesh was responsible for ensuring the safety and security of the Rohingya in and outside the camps and UNHCR was responsible for the fulfilment of their international protection mandate including access to territory, registration and documentation, access to assistance and justice, community participation, and education.²⁴

Accordingly, all Rohingyas living in Bangladesh are registered by Bangladesh and UNHCR and live in several camps in Cox’s Bazar districts. According to the UNHCR, there are currently 33,956 officially recognised Rohingya refugees (who have been living in the official camps since 25 August 2017 and registered jointly with UNHCR and the Refugee Relief and Repatriation Commission) and the remainder are registered refugees (this includes new arrivals and those formerly unregistered) and not officially recognised.²⁵ The Rohingyas who fall outside the

²¹ (2005) II ADC 371.

²² Kamal Hossain and Sharif Bhuiyan, ‘Bangladesh’ in Simon Chesterman et al. (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (OUP 2019) 604.

²³ Writ Petition No 10504 of 2016.

²⁴ Borhan Uddin Khan and Muhammad Mahabubur Rahman, *Country Fiche - Bangladesh: Global Asylum Governance and the European Union’s Role* (2020) 23 <https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Bangladesh_Final_Pub.pdf> accessed 29 December 2021.

²⁵ OHCHR, *Human Rights by Country: Bangladesh* (2018) <www.ohchr.org> accessed 29 December 2021.

registered refugees are called ‘Forcibly Displaced Myanmar Nationals’ by the Bangladesh government.²⁶

Official recognition is different from ascribing ‘refugee status’. Although, recognition declares one to be a refugee,²⁷ ‘refugee status’ is significant—it empowers the individual, provides some certainty to rights, can protect against the whim of ministerial changes in policy and ensures a coherent system of rights and protections under the Refugee Convention to a higher degree. Doubts about status may lead to additional dilemmas over what rights they are entitled to if return will be encouraged or actually carried out and who should bear the cost of their long-term residence.

Bangladesh has used labeling and lack of legal status as part of its policy refusal and maneuver to reinforce the message that any stay of the Rohingya refugees will be short term with limited protection, to acknowledge their presence in Bangladesh, to sign the Convention and to accept a temporary protection regime or *prima facie* refugees. For example, the *Bhasan Char* relocation project can be mentioned. The Bangladesh government has touted *Bhasan Char*, usually a disaster-prone island, as a solution to the severe overcrowding in the refugee camps in Cox’s Bazar and decided to relocate 100,000 refugees to the island without any involvement of the UN agencies.²⁸ Had there been any refugee status provided to the Rohingyas, the UN agencies could have played a stronger role in the relocation process.

16.4.2 Refugee Rights for the Rohingyas in the Constitution of Bangladesh

Persecution being a condition precedent to being a refugee connotes that they are a vulnerable group of people who have been deprived of their human rights and undergone severe sufferings. Even in the host-state, it is difficult for them to have a normal life as they struggle to cope up with a new reality of life. The Rohingya in Myanmar became subject to extreme movement restrictions, beatings, theft, extortion, arbitrary arrest, ill-treatment or torture in detention, sexual violence including gang rape which are being classified as ‘a text-book example of ethnic cleansing’ by the UN human rights chief.²⁹ After fleeing into Bangladesh, their life is still quite difficult as several

²⁶ Staff Correspondent, ‘Forcibly displaced Myanmar nationals’ *The Daily Star*, Dhaka, 27 September 2017 <<https://www.thedailystar.net/city/forcibly-displaced-myanmar-nationals-1469374>> accessed 29 December 2021.

²⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992) [157–160].

²⁸ Meenakshi Ganguly, ‘An Island Jail in the Middle of the Sea’ *Human Rights Watch*, 7 June 2021 <<https://www.hrw.org/report/2021/06/07/island-jail-middle-sea/bangladeshs-relocation-rohingya-refugees-bhasan-char>> accessed 29 December 2021.

²⁹ Noor Nanji, ‘UN Secretary-General urges end to Rohingya violence’ *The National*, 14 September 2017 <<https://www.thenational.ae/world/un-secretary-general-urges-end-to-rohingya-violence-1.628293>> accessed 1 January 2022.

reports reveal that they are living an uncertain life enclosed in the refugee camps, devoid of many rights and facilities legitimately entitled by refugees.

In such a circumstance, the refugees, regardless of their official status, need to be recognised by the host-state and be provided with special protection. Constitutional protection of rights, in the absence of any clear obligation under the 1951 Convention, is a significant mechanism that can provide such special protection. The previous discussions exemplify how several countries recognise the right to seek and enjoy asylum in different ways in their constitutions. All other human rights are also crucial prerequisites for the refugees. Although constitutions do not always explicitly make those rights available for the refugees in specific, the same can be done under the constitutional mandate. For example, the court held that even non-citizens have the fundamental right to life, liberty, and dignity in India³⁰ and refugees have right to gainful employment in Malaysia.³¹

In contrast to the fundamental principles of state policy (FPSP) which are non-enforceable, Part III of the Constitution of Bangladesh enlists two different types of 18 fundamental rights: (1) applicable to the citizens of Bangladesh only, and applicable to both the citizens and non-citizens. All fundamental rights are applicable to the citizens. There are 7 fundamental rights applicable to the non-citizens: (1) right to protection of law (art 31); (2) right to life and personal liberty (art 32); (3) right to safeguards during arrest and detention (art 33); (4) right not to be subjected to forced labour (art 34); (5) right to protection in respect of trial and punishment (art 35); (6) right to freedom of religion subject to law, public order, and morality (art 41); and (7) right to move the HCD in accordance with article 102 to enforce fundamental rights (art 44).

The abovementioned rights are of special significance for the refugees since they provide the most essential impetus required for living with dignity. The constitutional interpretation of these rights by the judiciary of Bangladesh also supports the wider application of them. For instance, right to life has been explained to cover not only the right to mere existence, rather it is a penumbra right covering many more rights within its ambit. In the *Ain O Salish Kendra (ASK) v Government of Bangladesh and others*, the HCD held

[T]he right to life includes the right to livelihood. Art 8(2) provides that the FPSP, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The principles contained in articles 15 and 20 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. The state may not by affirmative actions be compellable to provide adequate means of livelihood or work to citizens. But any person including the refugees, who is deprived of his right to livelihood except according to just and fair procedure can challenge the deprivation as offending the right to life conferred by art 32.³²

The same can be done for the right to protection in respect of trial and punishment. The *Refugee and Migratory Movements Research Unit Refugee and Migratory*

³⁰ *Louis De Raedt v Union of India* [1981] AIR SC 1886 [12].

³¹ *Ali Salih Khalaf v Taj Mahal Hotel* [2014] 4 *Indian Law Journal* 20 [9].

³² *Ain O Salish Kendra (ASK) v Government of Bangladesh* (1999) BLD 488.

*Movements Research Unit (RMMRU) v Bangladesh*³³ case is pertinent here. In 2016, in response to a Writ Petition filed by the Refugee and Migratory Movements Research Unit (RMMRU), the State was required to explain why Rafique, who had completed his five-year sentence in May 2012, was still languishing in prison. On 31 May 2017, after three full hearings, the Appellate Division of the Supreme Court (AD) held that Rafique had been imprisoned without lawful authority since the expiry of his prison term. It further directed the State to immediately release him from prison and hand him over to RMMRU, which would arrange with UNHCR for Rafique's accommodation in a refugee camp in Cox's Bazar. In 2015, the Court directed the release of five Rohingya refugees (who possessed UNHCR-issued refugee cards) to be returned to the Kutupalong refugee camp where they had previously been living.³⁴ There are previous instances of non-citizens filing writ petition under article 102. *Md. Abid Khan and others v The Government of Bangladesh and others*,³⁵ and *Bangladesh v Prof. Golam Azam*³⁶ are two such notable cases. Given that the abovementioned fundamental rights are applicable to non-citizens, the Rohingyas may enforce the same by following appropriate legal procedure.

According to article 8(2) of the Constitution, although the FPSP are not judicially enforceable, the AD has enforced many of them through harmonious interpretation with fundamental rights in several cases. For example, in the *Ain O Salish Kendra (ASK) v Government of Bangladesh and others*,³⁷ the HCD held that wholesale eviction of the slum dwellers will violate their right to life which includes the right to livelihood. Article 8(2) provides that the FPSP, though not enforceable by any court, are nevertheless fundamental in the governance of the country. Several fundamental principles enumerated in the constitution are also applicable to the Rohingya refugees: (1) right to be free from exploitation (art 10); right to have fundamental human rights (art 11); and (3) right to free and compulsory education (art 17).

Intriguingly, article 17(a) and (c) which falls within the FPSP, do not mention 'citizens'. It also mentions all children' without any qualification. It may be interpreted that the responsibility of Bangladesh also extends to the children of non-citizens including the Rohingya children. As the principle is not automatically enforceable, it should be read with the corresponding implementing legislation, namely the Primary Education (Compulsory) Act 1992. Moreover, the AD has enforced many FPSP through harmonious interpretation with fundamental rights in several cases.³⁸ In the *Faizul Islam (Md.) and Others Vs. Bangladesh and Others*,

³³ Writ Petition No 10504 of 2016.

³⁴ M Sanjeeb Hossain, 'Bangladesh's Judicial Encounter with the 1951 Refugee Convention' (2021) 67 *Forced Migration Review* 59–61.

³⁵ (2003) 55 DLR 318.

³⁶ (1994) 46 DLR (AD) 192.

³⁷ (1999) 4 MLR (HC) 358.

³⁸ (1999) BLD 488.

the HCD invalidated the imposition of VAT on the English medium schools relying on Articles 15, 17 and 19 of the Constitution.³⁹

However, the most important provision for refugee protection under part II is article 25 which creates ample scope for application of provision of international human rights law and customary international law for vulnerable groups. When governments are unable or unwilling to protect their people, they may be forced to leave their country owing to serious threat and seek safety in another country which needs to ensure that the refugees' basic rights are respected.⁴⁰ In the *RMMRU* case, the HCD applied and upheld the customary rule of non-refoulement under Article 33(1) of the 1951 Convention to ensure the protection of the rights of the Rohingya.

These discussions indicate that, although the Bangladesh Constitution does not explicitly recognise refugee rights, it provides enough scope for asserting and implementing human rights for the refugees. Through broader interpretation of penumbra rights along with precedential development, a few fundamental rights can be ensured for the Rohingya refugees staying within the territory of Bangladesh. But without specific provisions/mechanism, such protection is broadly contingent upon the legislatures and judiciary. In this case, the geopolitical factors can easily deprive the refugees from their rights owing to political whim, for example, despite having scope within constitutional framework, the Bangladesh Government has denied right to education of the Rohingya children by banning formal education for them. However, the Bangladesh government has endorsed the Guideline for Informal Education Program for Children of Forcibly Displaced Myanmar Nationals in Bangladesh to provide a structure of informal learning for the Rohingya children on 5 May 2019.⁴¹ Since 28 January 2020, the Rohingya children in Bangladesh have been allowed to receive formal education in the Burmese language and follow Myanmar's national curriculum.⁴²

16.5 Solutions to the Rohingya Refugeehood in the Constitution of Bangladesh Through Local Integration

Refugee protection is an integral part of the refugee problem, and the necessity of permanent solutions are undeniable. There are three permanent solutions in this regard: voluntary repatriation, local integration, and resettlement in a third country. They all provide a relief from the feeling of alienation and help the refugees to start

³⁹ (2016) Writ Petition 10,127/2015.

⁴⁰ Nicholson and Kumin (n 2) 15.

⁴¹ Guideline for Informal Education Program (GIEP) For Children of Forcibly Displaced Myanmar Nationals (FDMN) in Bangladesh <<https://www.globalpartnership.org/sites/default/files/2019-05-bangladesh-informal-education-program-rohingya.pdf>> accessed 1 January 2022.

⁴² *ibid.*

their life anew. When a refugee flees to a new country, he/she constantly feels unsafe, traumatised and vulnerable owing to their experience of persecution. It is extremely difficult to match or even understand the new culture they have been exposed to. Usually, an asylum seeker becomes subject to several restrictions that make him/her separate from the host-community. In such a situation, durable solutions can reduce the feeling of alienation by gradually exposing the refugees to the host country's culture and including them in it.

Where voluntary repatriation becomes feasible, refugees can be more decisive. When repatriation is not possible, resettlement or local integration help them start their life anew. With proper protection and opportunities, refugees coming from different culture can be integrated in the host-country and contribute to its development.

The Bangladesh government has already signed a memorandum of understanding with Myanmar for the repatriation of Rohingya refugees from Bangladesh. However, due to the Covid-19 situation and other political challenges, the formal repatriation process has not yet been started. The Myanmar military seized control on 1 February 2021 following a general election and is now in charge.⁴³ The military played an active role in persecuting the Rohingya population in Myanmar. Hence, the chance of repatriation is highly unprobeable.

The option of resettlement also seems infeasible considering that the neighboring countries never communicated their interest in hosting them. Although an effective solution, a regional effort, to be an enduring solution would require an extensive and articulated national and regional framework subsumable in international law.⁴⁴ It would be better if the South Asian countries deal with the refugee problems in a united way. A merit worthy suggestion in this regard, made in several studies is that South East Asian countries, would be better off substantially resolving the Rohingya crisis through unilateral regional reforms in lieu of domestic initiatives.⁴⁵ Nevertheless, such argument, regardless of its merit, is limited in that it ignores the relevance of the international legal paradigm in existence for dealing with such a crisis, a paradigm that has already extended beyond the domestic and regional spheres into being an area of concern for the global community.⁴⁶

Ruling out repatriation and resettlement, the only feasible durable solution for the Rohingya refugees can be local integration. The assumption of the notion of local integration is the indefinite stay of the refugees in their country of asylum in hopes of a solution to their plight, which in ideal circumstances would involve their

⁴³Alice Cuddy, 'Myanmar coup: What is happening and why' *BBC News* (1 April 2021) <<https://www.bbc.com/news/world-asia-55902070>> accessed 30 December 2021.

⁴⁴Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' (2019) 39 (1) *Journal of Muslim Minority Affairs* 18.

⁴⁵Maya Than and Tin Mung Mung Than, 'ASEAN Enlargement and Myanmar' in Mya Than and Carolyn Gates (eds), *ASEAN Enlargement: Impacts and Implications* (Institute of Southeast Asian Studies 2001) 249–61.

⁴⁶Jobair Alam, 'The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law' (2018) 25 *International Journal on Minority and Group Rights* 157–182, 177.

acquisition of citizenship.⁴⁷ The UNHCR Executive Committee in its 2005 Conclusion No. 104 (LVI) on local integration highlighted local integration as a vital burden sharing activity and clarified, ‘UNHCR’s catalytic role in assisting and supporting countries receiving refugees...and in mobilizing financial assistance and other forms of support, including development assistance from the international community’.⁴⁸

There is no scope of local integration in the Bangladesh Constitution; nor did the government in its policy level decision provide any scope for such integration of the Rohingya. The Bangladesh Citizenship (Temporary Provisions) Order 1972 was enacted to deal with the inadequacies of the Citizenship Act 1951. It provides a definition of citizenship of Bangladesh. Article 2B (2) of the Order of 1972 provides that the ‘Government may grant citizenship of Bangladesh to any person who is a citizen of any state of Europe or North America or of any other state which the Government may, by notification in the official Gazette, specify in this behalf’.

The Bangladesh government has not provided citizenship to any Rohingya till date. Besides, the citizenship laws of Bangladesh provide the scope of obtaining citizenship through marriage. The law only allows the non-citizen wife of Bangladeshi citizens to acquire the Bangladeshi citizenship, not *vice-versa*. Two later circulars, published in 2014 and 2017, further undermined the right to marry for both citizens and refugees by directing registrars not to register the marriages of Bangladeshi citizens and unregistered refugees with refugees registered prior to 2017.⁴⁹ The omission to register a Muslim marriage does not invalidate the marriage itself. But section 4(3)(ii) of the Bangladesh Citizenship (Temporary Provisions) Rules 1978 mentions ‘marriage certificate’ as one of the required documents to submit in support of a naturalisation application. Thus, the Rohingya women apparently do not benefit from this system.

In *Babul Hossain v. Bangladesh* case,⁵⁰ the petitioner challenged the legality of the marriage ban before the HCD. In this case, the petitioner’s son, Shoaib Hassan Juwel, a Madrasa teacher at Jatrabari fell in love with Rafiza, a Rohingya woman residing at the Kutupalong Refugee Camp. They secretly married and Juwel brought her out of the camp. But the Court dismissed the petition *in limine* and fined the petitioner with 1 lac Taka. The Court also controversially held that marrying a Rohingya woman is a blatant contravention of the Administrative Circular of 2017⁵¹ and taking her out of camp is a criminal offence under the Foreigners Act 1946.⁵²

⁴⁷ Jess Crisp, ‘The Local Integration and Local Settlement of Refugees: A Conceptual and Historical Analysis’, Working Paper No 102 of 2004 (Evaluation and Policy Analysis Unit).

⁴⁸ Executive Committee of the High Commissioner’s Programme, ‘Conclusion on Local Integration No 104 (LVI) – 2005’ A/AC.96/1021.

⁴⁹ UNHCR, Registration of The Marriages and Divorces of Refugees (2019) < unhcr_note_on_refugee_marriage_and_divorce_fv.pdf > accessed 30 May 2022.

⁵⁰ Writ Petition No 18162 of 2017.

⁵¹ Ministry of Law Justice and Parliamentary Affairs, Administrative Circular No. bichar-7/2n-75/2016–909 (25 October 2017).

⁵² The Foreigners Act, 1946, s 14.

Right to livelihood being an extremely important element of local integration is not provided to the Rohingya sufficiently. The NGO Affairs Bureau (NGOAB) under the Prime Minister's Office issued three memoranda for providing the 'Framework for NGOs working on behalf of Forcibly Displaced Myanmar Nationals'. The NGOAB Memorandum No. 03.07.2666.661.51.019.17-105 of 6 March 2018 (2017 NGOAB Memorandum) neither endorses nor prohibits the possibility of employing the Rohingyas within the camps.⁵³ On 28 March 2018, Inter Sector Coordinator Group issued 'Standard Operating Procedure: Cash for Work Programming' where it provides the scope of 'Cash for Work' initiatives for both host communities and Rohingyas for short term temporary activities in exchange for cash.⁵⁴ The Guidance on Rohingya Volunteer Incentive Rates has issued by RRRC and ISCG on 7 July 2018 setting the incentives of different categories of Rohingya volunteers and Cash for Work beneficiaries and also laid down the principle of Rohingya volunteer engagement.⁵⁵ The NGOAB Memorandum No. 03.07.2666.661.51.019.17-10 of 23 September 2019 (2019 NGOAB Memorandum) has prohibited the employment of Rohingyas and the cash for work program (arts 11-12).⁵⁶

The Bangladesh government can easily ensure local integration of the Rohingya population under the constitutional mandate. By providing the rights accessible to the refugees especially right to work and livelihood, right to education and right to health, local integration of the Rohingya can be started. Considering the geopolitical reality, it is apparent that the Rohingya are not leaving Bangladesh anytime soon. If they can be locally integrated and their immense manpower could be utilised for development, the refugee population will function as an asset in easing the burden of host-country Bangladesh.

16.6 Conclusion: Ensuring Rohingya Refugee's Protection Through the Constitution

Considering the scant regional and international protection, the national protection provided by Bangladesh is extremely important for the Rohingya refugees. Further since Bangladesh is not a party to the 1951 Convention or its 1967 Protocol, there is an absence of strict international obligation for the protection of the Rohingya refugees. Therefore, the constitutional framework of Bangladesh can provide the

⁵³ NGOAB, Framework for NGO's (2018) <http://www.ngoab.gov.bd/sites/default/files/files/ngoab.portal.gov.bd/notices/e2857aa2_dea6_4749_97c3_79241e30207d/Notice-180001.pdf> accessed 28 April 2021.

⁵⁴ ISCG, Standard Operating Procedure: Cash for Work Programming <https://reliefweb.int/sites/reliefweb.int/files/resources/cwg_sop.pdf> accessed 27 April 2021.

⁵⁵ *ibid.*

⁵⁶ Alam (n 46).

necessary protection for the Rohingya. At the heart of any protection mechanism lies making the refugees resilient, adaptable, and self-reliant through providing them the refugee status and granting the rights they are entitled to under international law. Although complex and elaborate, the local integration of refugees is also phenomenal to secure the legal, socio-economic, and other rights of the refugees. In 2012, the Zambian governments took an initiative of providing permanent residency to 10,000 former Angolan refugees who would then qualify for local integration and citizenship subject to their type of residency permit (averaging 10 years).⁵⁷

Any satisfactory protection regime that can be expanded to the Rohingya refugees is absent in the constitutional framework of Bangladesh. Under such circumstances, as has previously been done by the judiciary in Bangladesh by giving effect to the FPSP through the mandate and harmonious interpretation of fundamental rights, protection can still be extended to the Rohingya refugees through the interpretation of constitutional provisions. The role of the judiciary in this regard is pivotal considering the influence they can exert in terms of expanding indirect constitutional protection to the Rohingya refugees. For example, the right to life guaranteed to both citizens and non-citizens under article 32 means at the very least a right to a decent and healthy way of living and on the broad stroke connotes a life worth living.⁵⁸ Therefore, right to life clause enshrines inherently several other rights including right to health and livelihood irrespective of whether these rights are afforded to non-citizens or not.

While these approaches may sound quite pleasant and optimistic, the reality is far from it in the opposite direction. Ensuring local integration and expanding constitutional protection would have to deal with the initial hurdles of ensuring national economic capacity to deal with the same, insular politics regarding such integration and constitutional protection and finally with reaction of the local population. The national economic capacity can presumably be enhanced with the formal introduction and contribution of the Rohingya in the economy. The regional and international co-operation and burden sharing could also help, although the (non)readiness of such initiative is yet another issue.⁵⁹ However, sustainable balance between the Rohingya and local population alongside the consequential insular politics will be a hurdle that has to be progressively dealt with even if constitutional protection is expanded to them.

⁵⁷ Nicholson and Kumin (n 2) 234–35.

⁵⁸ *Adv Zulhas Uddin Ahmed v Bangladesh* (2010) 15 MLR (HCD) [18]; *Dr Mohiuddin Farooque (BELA) v Bangladesh* 55 DLR (HCD) 69 [23].

⁵⁹ Jobair Alam, 'The Status and Rights of the Rohingya as Refugees under International Refugee Law: Challenges for a Durable Solution', (2021) 19 (2) *Journal of Immigrant & Refugee Studies* 128–41.

References

Books

- Locke, John. 1952. *Second Treatise on Government*. Peardon ed. New York: Liberal Arts Press.
- Ludwig, Bernadette. 2016. *Wiping the Refugee Dust from My Feet: Advantages and Burdens of Refugee Status and the Refugee Label*. John Wiley & Sons Ltd.
- Nicholson, Frances and Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parliamentarians No 27* (Inter-Parliamentary Union and UNHCR 2017).
- UNHCR. 1992. *Handbook on Procedures and Criteria for Determining Refugee Status*.

Chapters in Edited books

- Hossain, Kamal, and Sharif Bhuiyan. 2019. Bangladesh. In *The Oxford Handbook of International Law in Asia and the Pacific*, ed. Simon Chesterman, Hisashi Owada, and Ben Sau, 604. Oxford: OUP.
- Than, Maya, and Tin Maung Maung Than. 2001. ASEAN Enlargement and Myanmar. In *ASEAN Enlargement: Impacts and Implications*, ed. Mya Than and Carolyn Gates, 249. Singapore: Institute of Southeast Asian Studies.

Articles

- Alam, Jobair. 2018. The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law. *International Journal on Minority and Group Rights* 25: 157.
- . ‘The Current Rohingya Crisis in Myanmar in Historical Perspective’ (2019) 39 (1) *Journal of Muslim Minority Affairs* 18, 1, 25.
- . 2021. The Status and Rights of the Rohingya as Refugees under International Refugee Law: Challenges for a Durable Solution. *Journal of Immigrant & Refugee Studies* 19 (2): 128.
- Cameron, H. Evans. 2010. Refugee Status Determinations and the Limits of Memory. *International Journal of Refugee Law* 22 (4): 469.
- Crisp, Jess. The Local Integration and Local Settlement of Refugees: A Conceptual and Historical Analysis. Working Paper No 102 of 2004 (Evaluation and Policy Analysis Unit).
- Hossain, M. Sanjeeb. 2021. Bangladesh’s Judicial Encounter with the 1951 Refugee Convention. *Forced Migration Review* 67: 59–61.
- Lermack, Paul. 2007. The Constitution Is the Social Contract So It Must Be a Contract ... Right? A Critique of Originalism as Interpretive Method. *William Mitchell Law Review* 33 (4): 1426.

Internet Sources

- Cuddy, Alice. 2021. Myanmar coup: What is happening and why. *BBC News*, April 1. <https://www.bbc.com/news/world-asia-55902070>. Accessed 30 Dec 2021.
- Executive Committee of the High Commissioner’s Programme. 2004. *Conclusion on International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations No. 100 (LV)* – 2004. <https://www.refworld.org/docid/41751fd82.html>. Accessed 27 Dec 2021.

- Ganguly, Meenakshi. 2021. An Island Jail in the Middle of the Sea. *Human Rights Watch*, June 7. <https://www.hrw.org/report/2021/06/07/island-jail-middle-sea/bangladeshs-relocation-rohingya-refugees-bhasan-char>. Accessed 29 Dec 2021.
- Guideline for Informal Education Program (GIEP) For Children of Forcibly Displaced Myanmar Nationals (FDMN) in Bangladesh <https://www.globalpartnership.org/sites/default/files/2019-05-bangladesh-informal-education-program-rohingya.pdf>
- Internet Encyclopedia of Philosophy, *Social Contract Theory* <https://iep.utm.edu/soc-cont/>. Accessed 28 Dec 2021.
- ISCG, Standard Operating Procedure: Cash for Work Programming. https://reliefweb.int/sites/reliefweb.int/files/resources/cwg_sop.pdf. Accessed 27 Apr 2021.
- Khan, Borhan Uddin and Muhammad Mahabubur Rahman, *Country Fiche – Bangladesh: Global Asylum Governance and the European Union's Role* (2020) 23 https://www.asileproject.eu/wp-content/uploads/2021/03/Country-Fiche_Bangladesh_Final_Pub.pdf. Accessed 29 Dec 2021.
- Nanji, Noor. 2017. UN secretary-general urges end to Rohingya violence. *The National*, September 14. <https://www.thenational.ae/world/un-secretary-general-urges-end-to-rohingya-violence-1.628293>. Accessed 1 Jan 2022.
- NGOAB, Framework for NGO's. 2018. http://www.ngoab.gov.bd/sites/default/files/files/ngoab.portal.gov.bd/notices/e2857aa2_dea6_4749_97c3_79241e30207d/Notice-180001.pdf. Accessed 28 Apr 2021.
- OHCHR, Human rights by country: Bangladesh 2018. www.ohchr.org. Accessed 29 Dec 2021.
- Staff Correspondent. 2017. Forcibly displaced Myanmar nationals. *The Daily Star*, Dhaka, September 27. <https://www.thedailystar.net/city/forcibly-displaced-myanmar-nationals-1469374>. Accessed 29 Dec 2021.
- UNHCR, Registration of The Marriages and Divorces of Refugees. 2019. [unhcr_note_on_refugee_marriage_and_divorce_fv.pdf](https://www.unhcr.org/refugee-status-determination.html). Accessed 30 May 2022.
- . Refugee Status Determination. <https://www.unhcr.org/refugee-status-determination.html>. Accessed 26 Dec 2021.

Jobair Alam is an Associate Professor of Law at the University of Dhaka and a Fellow of the Higher Education Academy, UK. He is currently an elected member of the Executive Council of the Asian Society of International Law. He obtained PhD from Macquarie University in 2019 with Executive Dean's Excellence Award. He secured top position with first class in both LLM and LLB (Hons) from Dhaka University. In recognition of outstanding academic achievements, he has been awarded 7 gold medals from the Prime Minister, President, and Chief Justice of Bangladesh. Apart from 16 scholarly conference paper presentations, he has published 7 book chapters and 16 journal articles in refereed national and international journals. His major publications in the main include: *Responsibility to Protect in International Criminal Law: The Case of the Genocide against the Rohingya* (Oxford University Press, 2021); *The Status and Rights of the Rohingya as Refugees under International Refugee Law: Challenges for a Durable Solution* (Routledge, 2021); *The Current Rohingya Crisis in Myanmar in Historical Perspective* (Routledge, 2019); and *The Rohingya Minority of Myanmar: Surveying their Status and Protection in International Law* (Leiden/Boston: Brill Nijhoff, 2018).

Chapter 17

Ocean Governance, Blue Economy and the Constitution of Bangladesh: Emerging Rights of the People and Nature



Md Saiful Karim

Abstract For safeguarding intergenerational and intra-generational equity, Bangladesh needs to ensure sustainable utilisation and conservation of its marine area. The Constitution of Bangladesh vests the management of marine natural resources in the Republic. The government has an obligation to manage these resources as public trust properties. In several decisions, the Supreme Court of Bangladesh liberally interpreted the fundamental right to life to include the right to a healthy environment. Recently the rights of nature have received attention in the Bangladeshi constitutional jurisprudence through the fifteenth amendment of the Constitution and a judgment of the Supreme Court of Bangladesh. As the ocean is remarkably absent in the constitutional literature of Bangladesh, this chapter examines the role of the Constitution in ensuring the rights of the people and nature in the process of blue economic development.

Keywords Ocean governance · Constitutional law · Rights of the people · Rights of the nature · Inter-generational equity · Marine resources · Conservation and management · Blue Economy

17.1 Introduction

Many people in Bangladesh are dependent on marine resources for their livelihoods. Marine resources will be of paramount importance for national development due to the dearth of natural resources per capita on the land. Following the delimitation of the maritime boundary with the neighbouring countries, blue economic

Md S. Karim (✉)

School of Law, Queensland University of Technology (QUT), Brisbane, Australia

e-mail: mdsaiful.karim@qut.edu.au

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*, https://doi.org/10.1007/978-981-99-2579-7_17

development is now a significant policy agenda for Bangladesh.¹ Sustainable blue economic development may be impeded due to pollution, unsustainable resource exploitation and the severe impact of climate change on the marine and coastal areas of the country.

This chapter examines whether the Constitution, as the supreme law of the land, can play a role in ensuring the balance between blue economic development and the rights of the people and nature. It shows that a constitutional legal framework for the rights of the *people and nature* has been emerging through the liberal interpretation of the relevant constitutional provisions by the Supreme Court. This chapter argues that the Republic has a duty for the conservation and sustainable utilisation of the marine resources with due respect to the rights of the people and nature.

Part 2 presents the conceptual framework of the chapter. Part 3 briefly discusses the legal issues concerning environmental rights, public trust, and rights of nature in Bangladesh. Part 4 critically analyses the constitutional provisions on the marine area. Part 5 documents the historical and contemporary contexts of the constitutional provisions on non-living marine resources. Part 6 highlights the legal issues concerning marine living resources and the rights of the ocean-dependent people. This part also critically examines the constitutional implications of a recent amendment to the *Territorial Waters and Maritime Zones Act, 1974*.² The final part concludes the chapter with some observations on the conservation of the marine areas.

17.2 Conceptual Framework

This part briefly introduces three conceptual frameworks of the chapter, including the right to a healthy environment, the doctrine of public trust and the rights of nature.

17.2.1 Right to a Healthy Environment

The right to a healthy environment as a component of the right to life, or a separate right, has been increasingly recognised in international and comparative law.³ Although no major international human rights treaty expressly recognises it as a separate right, many regional and national legal instruments now recognise the right

¹M Gulam Hussain et al., 'Major Opportunities of Blue Economy Development in Bangladesh' (2018) 14 *Journal Indian Ocean Regulation* 88.

²Act No. XXVI of 1974 (hereafter TWMZ Act, 1974).

³Generally, John H Knox and Ramin Pejman (eds), *The Human Right to A Healthy Environment* (CUP 2018).

to a healthy environment.⁴ In 2021, the UN Human Rights Council adopted a legally non-binding resolution recognising ‘the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights’.⁵ Moreover, many regional and national courts interpreted the right to life inclusive of the right to a healthy environment.⁶

The right to a healthy environment is very relevant to ocean governance both in the context of the right of the ocean dependent people and the people of Bangladesh as a whole. In another sense, the ocean itself is vitally important for human rights as a major provider of resources, livelihoods, carbon sink, and ecosystem services.⁷

17.2.2 *The Doctrine of Public Trust*

The essence of the Public Trust Doctrine is that the government exercises control over certain natural resources as a trustee of the people and not as an owner. Historically, this doctrine played an important role in ocean governance⁸, and its role in the protection of the ocean is increasingly acknowledged in the existing literature.⁹ This doctrine is now a part of environmental jurisprudence and premised on the need for the protection of natural resources for the benefit of both present and future generations.¹⁰

⁴ *Good Practices on the Right to A Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/43/53 (30 December 2019).

⁵ *The Human Right to A Clean, Healthy and Sustainable Environment*, UN Doc. A/HRC/RES/48/13 (18 October 2021).

⁶ Generally, David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012); Sumudu Atapattu, ‘The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law’ (2002) 16 *Tul Envtl LJ* 65.

⁷ UN Environment Programme, 5 Reasons Why a Healthy Ocean is Linked to Human Rights (F9 December 2021) <<https://www.unep.org/news-and-stories/story/5-reasons-why-healthy-ocean-linked-human-rights>> accessed 7 January 2022.

⁸ Jack H. Archer and M. Casey Jarman ‘Sovereign Rights and Responsibilities: Applying Public Trust Principles to the Management of EEZ Space and Resources’ (1992) 17 *Ocean Coast Manag* 253, 256.

⁹ *ibid.*; Mary Turnipseed et al., ‘Using the Public Trust Doctrine to Achieve Ocean Stewardship’ in Christina Voigt (ed), *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (CUP 2013) 365. J.C. Sylvan, ‘How to Protect a Coral Reef: The Public Trust Doctrine and the Law of the Sea’ (2006) 7 *Sustainable Dev L & Pol’y* 32; Jeffrey Thaler and Patrick Lyons, ‘The Seas Are Changing: It’s Time to Use Ocean-Based Renewable Energy, Public Trust Doctrine, and a Green Thumb to Protect Seas from Our Changing Climate’ (2014) 19 *Ocean & Coastal LJ* 241.

¹⁰ Turnipseed et al., *ibid.*, 369–373.

17.2.3 *Rights of Nature*

Whether nature has independent rights separate from the people's environmental rights, who are dependent on nature, is a relatively new discourse. In 1972, Christopher Stone wrote a thought-provoking article arguing for a right of nature that means natural entities should be recognised as a holder of some rights.¹¹ With some initial inertia, this movement has gathered momentum recently.¹² A small number of countries have recognised the rights of nature either by legislative reforms or the liberal interpretation of existing laws by the superior courts.¹³ Determining the exact nature and elements of this right needs a complex discussion that is not possible here. Nonetheless, the concept of the rights of nature has already been advocated for promoting ocean stewardship at the global level.¹⁴

17.3 **Environmental Rights of the People, Public Trust, and Rights of Nature in Bangladesh**

17.3.1 *Environmental Rights of the People in Bangladesh*

Articles 31 and 32 of the Constitution of Bangladesh protect the right to life as a fundamental right. The Fifteenth Amendment of the Constitution introduced a new article recognising environmental protection as a fundamental principle of state policy. Various environmental laws enacted by the parliament supplement these constitutional provisions.¹⁵

More than 25 years ago, the Supreme Court of Bangladesh recognised an extended definition of the right to life enshrined in the Bangladesh Constitution that paved the way for recognising a constitutional right to a healthy environment. Following the path of other Indian Subcontinent countries, the Supreme Court of Bangladesh liberally interpreted the right to life under articles 31 and 32 of the

¹¹ Christopher D. Stone, 'Should Trees Have Standing--Toward Legal Rights for Natural Objects' (1972) 45 S Cal L Rev. 450.

¹² Generally, Daniel P Corrigan and Markku Oksanen (eds), *Rights of Nature: A Re-examination* (Routledge 2021).

¹³ Generally, Harriet Harden-Davies et al., 'Rights of Nature: Perspectives for Global Ocean Stewardship' (2020) 122 Marine Policy 10,405.

¹⁴ *ibid.*

¹⁵ For development of environmental law in Bangladesh see the relevant entries in Muhammad Ekramul Haque (eds), 'Bangladesh' in Seokwoo Lee (eds), *Encyclopedia of Public International Law in Asia – Volume III: Central & South Asia* (Brill 2020) 90–109; Abdullah Al Faruque and Md Saiful Karim, 'Environmental Law of Bangladesh' in Nicholas A Robinson et al. (eds), *Comparative Environmental Law & Regulation* (Thomson Reuters 2016) 7A:1.

Bangladesh Constitution to include a right to a healthy environment.¹⁶ The first decision of the Supreme Court was *Dr Mohiuddin Farooque v Bangladesh* decided on 1 July 1996.¹⁷ In this case, the High Court Division of the Supreme Court (HCD) held that the '[r]ight to life is not only limited to the protection of life and limbs....'¹⁸

The foundation of environmental public interest litigation was established by the Appellate Division of the Supreme Court (AD) in *Dr Mohiuddin Farooque v Bangladesh* (FAP 20 Case) by liberally interpreting the term 'person aggrieved' under article 102 of the Constitution.¹⁹ Justice BB Roy Chowdhury observed that the right to life also 'encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed'.²⁰ In another case, the HCD held that the right to life 'also means a qualitative life among others, free from environmental hazards'.²¹

After the above early decisions, the Supreme Court has applied an extended definition of the right to life in many cases. In a more recent case, the HCD held that '[r]ight to life means right to water, clean air, food, etc'.²² The Court referred to both present and future generations in this case.²³ In another case, the AD held that '[p]rotection of the environment and ecology has been recognised as a component of right to life guaranteed by articles 31 and 32 of the Constitution'.²⁴

The Fifteenth Amendment of the Constitution adopted in 2011 included a new article 18A requiring that the:

State shall endeavour to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests and wildlife for the present and future citizens.²⁵

This constitutional provision has two aspects. The first one is the protection and preservation of the environment and nature. This arguably resembles the rights of nature. The second aspect is doing so in the context of the rights of present and future citizens. Article 18A has been included in Part II of the Constitution as a

¹⁶ Generally, Md Saiful Karim et al., 'Legal Activism for Ensuring Environmental Justice' (2012) 7 Asian J. Comp. Law 346; Md Saiful Karim, *Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh* (Routledge 2018) 43–47.

¹⁷ *Dr Mohiuddin Farooque v Bangladesh* (1996) 48 DLR (HCD) 438.

¹⁸ *ibid.* 442.

¹⁹ *Dr Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD) 1 (hereafter FAP 20 Case).

²⁰ *ibid.* 25.

²¹ *Dr Mohiuddin Farooque v Bangladesh* (2003) 55 DLR (HCD) 69, 79.

²² *Human Rights and Peace for Bangladesh v Bangladesh*, Writ Petition No. 4242 of 2009 (14 March 2018) 11 <<https://www.hrbp.org.bd/upload/judgement/Writ-Petition-No.-4242-of-2009%2D%2D-Protection-of-Sandha-river.pdf>> accessed 17 January 2022 (hereafter HRPB v Bangladesh, Writ Petition No. 4242 of 2009).

²³ *ibid.*

²⁴ *Metro Makers and Developers Limited v Bangladesh Environmental Lawyers Association* (2013) 65 DLR (AD) 181, 236.

²⁵ The Constitution of the People's Republic of Bangladesh, 1972, article 18A.

Fundamental Principle of State Policy. This part of the Constitution is not ‘judicially enforceable’ but ‘shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws.’²⁶ Therefore, it is pertinent to examine whether this article has a broader implication in creating and strengthening the rights of the people and nature in Bangladesh.

Article 18A may have some implications for future interpretation of the constitutional rights of people and nature. The importance of Part II of the Constitution in the interpretation of the Constitution was well recognised long before the enactment of article 18A. As held by the AD in the FAP 20 case, ‘[i]t is constitutionally impermissible to leave out of consideration Part II of our Constitution when an interpretation of Article 102 needs a guidance’.²⁷

The broader implications of article 18A can be seen in the development of the intergenerational rights. In the FAP 20 case, the Court disagreed with the petitioner’s ‘submission that the association represents not only the present generation but also the generation yet unborn’.²⁸ The Court did so because the Bangladesh Constitution and other laws had no provision recognising intergenerational rights.²⁹ Article 18A now refers to the future citizens. Consequently, a different interpretation recognising intergenerational equity has emerged. In a recent case, the AD highlighted the importance of the ‘preservation of the ecological balance and protection of the natural resources’ particularly in the context of climate change for the benefit of future generations.³⁰ In another case, citing article 18A, the HCD held, ‘[f]or the present and future generation proper environment should be conserved’.³¹ The Court also highlighted the relevance of article 18A in development projects.³²

17.3.2 Application of Doctrine of Public Trust in Bangladesh

Some recent decisions of the Supreme Court indicate the emergence of the rights of nature in the constitutional discourses of Bangladesh. Arguably, the first entry point of the rights of nature in the Bangladeshi constitutional jurisprudence is the Supreme

²⁶ *ibid.*, art 8(2); for various interpretations of Part II of the Constitution, Mahmudul Islam, *Constitutional Law of Bangladesh* (third edition, Mullick Brothers 2012) 71–79; Karim, *Shipbreaking in Developing Countries* (n 16) 38–43.

²⁷ FAP 20 Case, 14.

²⁸ *ibid.*, 16

²⁹ *ibid.*

³⁰ *Mahbubul Anam v Ministry of Land* (2020) 72 DLR (AD) 239, 246.

³¹ *Human Rights and Peace for Bangladesh v Bangladesh*, Writ Petition No.11499 of 2014 (10 August 2016) 4 <<https://www.hrbp.org.bd/upload/judgement/Writ-Petition-No-11499-of-14-Mayor-House-construction-at-Chittagong.pdf>> accessed 17 January 2022.

³² *HRPB v Bangladesh*, Writ Petition No. 4242 of 2009 (n 22) 8.

Court's recognition of the Doctrine of Public Trust.³³ This doctrine is more related to a collective right of the public than the rights of the nature. The HCD held in 2012 that 'the Public Trust Doctrine, which is the concept of public trusteeship may be accepted as a basic principle for the protection of natural resources....'³⁴ However, the Court did not refer to article 18A.

Therefore, it should not be concluded that the recognition of this doctrine is a consequence of article 18A. Instead, the Court recognised it as a common law principle, and the Court's opinion was inspired by the Indian Supreme Court's decision in *M.C. Mehta v Kamal Nath* cited in the HCD judgment. Indeed, in another case, the HCD found the view in the *Kamal Nath case* 'is of great persuasive value and is an extended dimension of the environmental jurisprudence'³⁵ where the Indian Supreme Court emphatically held that the Indian 'legal system – based on English Common Law – includes the Public Trust Doctrine as part of its jurisprudence'.³⁶

17.3.3 Development of the Rights of Nature

Recognition of the Public Trust Doctrine is not an outright recognition of the rights of nature. The core of this doctrine is the protection of certain public property by the government as a trustee of the public. It does not create a right of the nature which is separate from the right of the public or people. Nevertheless, the protection of the nature for the betterment of the public is a key element of this doctrine.

The HCD recognised a river as a 'legal person' or 'legal entity' in a recent decision.³⁷ The AD disagreed with some of the observations and directions of the HCD but did not provide any opinion about the declaration of rivers as a legal person.³⁸ Therefore, this may, arguably, be used for according a similar legal status to the marine areas of Bangladesh if needed.

³³ On the doctrine of public trust generally, Md Azhar Uddin Bhuiyan, 'The Doctrine of Public Trust: Its Judicial Invocation in Bangladesh and the Future Potentials' (2021) 9 *Jahangirnagar University Journal of Law* 89–108.

³⁴ *Professor Dr A.F.M. Masud v Secretary, Ministry of Housing & Public Works*, Writ Petition No. 1058 of 2011 (11 June 2012) 5 <https://www.hrbp.org.bd/upload/frontImages/Writ_Petition_No._1058_of_2011_-_Dhanmondi_Residential_Area.pdf> accessed 17 January 2022.

³⁵ *Human Rights and Peace for Bangladesh v Bangladesh*, Writ Petition No. 6306 of 2010 (16 August 2016) 11 <https://www.hrbp.org.bd/upload/frontImages/Writ_Petition_No_6306_of_2010_River_Kornofuli_Protection.pdf> accessed 17 January 2022.

³⁶ *M.C. Mehta v Kamal Nath*, 13 December 1996 <<https://indiankanoon.org/doc/1514672/>> accessed 4 Feb 2022.

³⁷ *Human Rights and Peace for Bangladesh v Bangladesh*, Writ Petition No. 13989 of 2016 (30 January 2019 and 3 February 2019) 278 <http://www.supremecourt.gov.bd/resources/document/s/1048627_W.P.13989of2016.pdf> accessed 17 January 2022.

³⁸ *Nishat Jute Mills Limited v Human Rights and Peace for Bangladesh*, Civil Petition for Leave to Appeal No. 3039 of 2019 (17 February 2020) 12–13 <<https://www.hrbp.org.bd/upload/judgement/Civil-Petition-For-Leave-To-Appeal-No.-3039-of-2019%2D%2D-Legal-and-Living-Status-of-Rivers-of-Bnagladesh.pdf>> accessed 17 January 2022.

17.4 Constitutional Provisions on the Marine Area

Article 143 of the Bangladesh Constitution provides:

- (1) There shall vest in the Republic, in addition to any other land or property lawfully vested –
 - (a) all minerals and other things of value underlying any land of Bangladesh;
 - (b) all lands, minerals and other things of value underlying the ocean within the territorial waters, or the ocean over the continental shelf, of Bangladesh; ...
- (2) Parliament may from time to time by law provide for the determination of the boundaries of the territory of Bangladesh and of the territorial waters and the continental shelf of Bangladesh.³⁹

An initial draft of the Constitution also had a reference to ‘other natural resources’ and ‘foreshore’.⁴⁰ Article 143(2) was added to the Constitution as a forward-looking provision considering the inconsistent state practice and international legal uncertainties in 1972 regarding the breadth of the territorial waters and continental shelf.⁴¹

Article 143(1)(b) makes the resources of the territorial waters and continental shelf property of the Republic. According to the UN Convention on the Law of the Sea 1982 (UNCLOS), the coastal State’s sovereignty is extended to its territorial sea.⁴² However, the sovereign rights of the coastal State within the continental shelf are limited to ‘the mineral and other non-living resources of the seabed and subsoil’ and ‘living organisms belonging to sedentary species’.⁴³

The Constitution of Bangladesh is silent about the Exclusive Economic Zone (EEZ). In EEZ, the coastal State has sovereign rights over both living and non-living resources as well as for other economic activities.⁴⁴ Although the international legal status of EEZ was not fully developed in 1972, this was by then an emerging concept. It was emerging through state practice even before the Third UN Conference on the Law of the Sea held from 1973 to 1982.⁴⁵

³⁹ Bangladesh Constitution, art 143. See Muhammad Ekramul Haque, ‘Constitutional Provisions Regarding Law of the Sea’ in Seokwoo Lee (ed), *Encyclopedia of Public International Law in Asia* (Brill/Nijhoff, 2021) 124. For a general discussion on maritime zones relates laws of Bangladesh, see Haque (n 15) 112–24.

⁴⁰ Md Abdul Halim, *Making the Constitution of Bangladesh* (CCB Book Centre 2010) 176.

⁴¹ মোঃ আব্দুল হালিম, বাংলাদেশ গণপরিষদ বিতর্ক (reprint in Bangla, CCB Book Centre 2019) 861–63.

⁴² UN Convention on the Law of the Sea, 1982 (UNCLOS) 1833 UNTS 3, art 2(1).

⁴³ UNCLOS, *ibid.*, art 77(4).

⁴⁴ UNCLOS (n 42) art 56(1).

⁴⁵ Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing 2010) 83–84.

The International Court of Justice in *Fisheries Jurisdiction Case* (1974) held that the concept of Exclusive Fishery Zone (EFZ) has evolved under customary international law through state practice,⁴⁶ but ‘the limit of fisheries jurisdiction’ was divergent in state practice.⁴⁷ The EFZ paved the foundation for EEZ. The concept of EEZ, including the 200 nautical miles limit, as a *sui generis* maritime zone, has been agreed upon in the third UN Conference and clarified by Part V of the UNCLOS.⁴⁸ It has been opined that ‘perhaps’ an amendment should have been adopted to include a reference to EEZ in the Bangladesh Constitution.⁴⁹ Despite many constitutional amendments after the ratification of the UNCLOS, the Parliament is yet to include a reference to the EEZ in the Constitution. Considering the *sui generis* nature of this maritime zone, it may be desirable.⁵⁰

Article 143(2) has been implemented through the TWMZ Act, 1974, which includes a provision for an ‘economic zone’.⁵¹ This Act has been amended recently.⁵² The original subsection 5(2) of the Act provides:

All natural resources within the economic zone, both living and non-living, on or under the seabed and sub-soil or on the water surface or within the water column shall vest exclusively in the Republic.⁵³

This subsection has been deleted by the TWMZ Amendment Act 2021 without understanding that it was added in 1974 Act most likely to fill a gap in the Constitution. However, this has been replaced by some provisions declaring sovereign rights of the country over living and non-living resources of the EEZ and prohibition on exploration and exploitation of such resources without a license or authority granted by the government.⁵⁴

Bangladesh made a specific claim for ‘an economic zone’ ‘extending to 200 nautical miles measured from the baselines’ by a notification under subsection 5(1) of the TWMZ Act on 13 April 1974.⁵⁵ Bangladesh’s territorial sea, EEZ and continental shelf were further clarified in 2014 by a notification issued under the same Act after maritime boundary delimitation with Myanmar and India.⁵⁶

⁴⁶ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, 1974 ICJ Reports 3, 23.

⁴⁷ *ibid.* 40.

⁴⁸ UNCLOS (n 42) art 55–74.

⁴⁹ Mohiuddin Farooque, ‘Some Aspects of the Law of the Sea and Bangladesh Practice: Myths and Misfits’ in *Selected Writings of Mohiuddin Farooque: Environmental Order the Security of Survival* (Bangladesh Environmental Law Association 2004) 317, 321.

⁵⁰ *ibid.*

⁵¹ TWMZ Act, 1974 (n 2), original subsection 5(2); this subsection is now deleted by an amendment in 2021.

⁵² Territorial Waters and Maritime Zones (Amendment) Act, 2021, Act No. XXIX of 2021 (hereafter TWMZ Amendment Act, 2021).

⁵³ TWMZ Act 1974 (n 2), original subsection 5(2), this subsection is deleted by TWMZ Amendment Act, 2021.

⁵⁴ TWMZ Act 1974 (n 2), sections 5 and 5A (added by TWMZ Amendment Act, 2021 (n 52)).

⁵⁵ Notification No. LT – I/3/74, Ministry of Foreign Affairs (13 April 1974) <<http://extwprlegs1.fao.org/docs/pdf/bgd4587.pdf>> accessed 7 January 2022.

⁵⁶ S.R.O. No. 294-Law/2014/Act/MoFA/UNCLOS/113/2/14.

17.5 The Constitution and Non-Living Resources: Historical and Contemporary Contexts

The Bangladesh Constitution vests the minerals underlying both land and marine areas in the Republic. The HCD held in *Abdul Khaleque v Bangladesh*: ‘minerals and other things of value underlying any land or ocean within our territorial waters, or the ocean over continental shelf are given special treatment in the Constitution as property title to which is directly vested in the Republic’.⁵⁷

A brief analysis of the history of the sovereign ownership of minerals may be helpful. Latin maxim *cujus est solum ejus est usque ad coelum et ad infero*, roughly implies that the land owner owns everything above and beneath the land,⁵⁸ which was accepted as the basis for ownership of minerals under common law in England.⁵⁹ This essentially established surface estate owner’s ownership on the minerals beneath their land.⁶⁰ As an exception to this general principle, the King’s Bench in the 1567 *Queen v The Earl of Northumberland* case held that ‘all ores or mines of copper, or other base metal, containing or bearing gold or silver belong to the King’.⁶¹ The application of these common law principles in British India was doubtful.⁶²

During the British colonial period, the ownership of minerals in India, particularly in the undivided Bengal, was a highly contested legal issue. It was a disputed issue involving colonial governments, zamindars (landlords) and other parties. In most parts of Bengal, generally under the permeant settlement, the zamindars used to exercise ownership of minerals.⁶³ Many successful cases of zamindars asserting minerals rights against third parties arguably did not have an impact on the government’s rights unless the government was a party to the litigation.⁶⁴ For example, the Privy Council in the 1912 *Durga Prasad Singh v. Braja Nath Bose* held that ‘[a]pparently the Government does not claim the minerals under permanently settled estates... The rights of the Government, whatever they are, will not be prejudiced or affected by the result of a suit to which it is not a party’.⁶⁵

⁵⁷ *Abdul Khaleque v Bangladesh* (2018) 70 DLR (HCD) 267, 271; also, *Conforce Limited v Titas Gas Transmission & Distribution Co. Ltd* (1990) 42 DLR (HCD) 33.

⁵⁸ Adrian J Bradbrook, ‘Relevance of the Cujus Est Solum Doctrine to the Surface Landowner’s Claims to Natural Resources Located Above and Beneath the Land’ (1988) 11 *Adelaide Law Review* 462.

⁵⁹ Samantha Hepburn, *Mining and Energy Law* (CUP 2015) 5. Later the UK created crown’s ownership for oil and gas; see, Petroleum (Production) Act 1934, 1934, Chap. 36. According to sect. 1 of this Act ‘[t]he property in petroleum existing in its natural condition in strata in Great Britain is hereby vested in His Majesty...’ *ibid.* Interestingly, the word ‘vest’ also used in Bangladesh, India, and Pakistan’s constitutions.

⁶⁰ *ibid.*

⁶¹ *The Queen v The Earl of Northumberland* (1567) 1 Plowden 310, 337. 75 E.R. 472

⁶² Gilbert Stone, *Mining Laws of the British Empire and of Foreign Countries: Vol. VI British India*. (His Majesty’s Stationery Office 1924) 4.

⁶³ *ibid.*, 18.

⁶⁴ *ibid.*

⁶⁵ *Raja Sri Sri Durga Prasad Singh v Braja Nath Bose and others* (Fort William (Bengal) [1912] UKPC 20.

As noted by Gilbert Stone in 1924: '[t]he whole position so far as the respective rights of the State, the zamindars, and perpetual leases of proprietary lands cannot be regarded as finally elucidated'.⁶⁶ In fact, the British colonial government tried to assert ownership on minerals in the *Secretary of State for India v Raja Jyoti Prashad Singh Deo Bahadur* decided by the Privy Council in 1926.⁶⁷ The Privy Council ultimately did not decide on the issue regarding the government ownership of minerals in private land but held that '[t]he question whether mines and minerals belonged to the landowners or to the Government is far-reaching one...'.⁶⁸

The above discussion indicates the lack of a clear general provision during the colonial era. Nevertheless, there were different arrangements for the ownership of minerals in various parts of British India. During the colonial period, some Indian provinces enacted minerals and mining laws.⁶⁹ In a sense, these laws are the forerunner of the current constitutional provisions of Bangladesh, India, and Pakistan.

All three subcontinental countries established national ownership in the marine area. In a limited sense, this was also established in the colonial period. For example, in 1916, the Privy Council recognised the government ownership of a newly formed island in the territorial waters.⁷⁰ In the Indian Constitution, the ownership of mineral resources in the land and maritime area are treated differently. It acknowledges both public and private ownership of minerals in the land territory.⁷¹ However, it took a different approach for the marine area where all '[a]ll lands, minerals and other things of value' are vested in the Union.⁷² The 1956 and 1962 Pakistan constitutions also had provisions like the Indian Constitution.⁷³

Bangladesh made a bold departure from Pakistan and India by creating sovereign ownership on minerals underlying both land and marine areas of the country. This should be understood in the context of the overall constitutional scheme of the country and the historic struggle for an egalitarian society free from the economic exploitation of people. The Republic's ownership of mineral resources is consistent with the aim for a 'socialist economic system'⁷⁴ and the establishment of ownership and control of the people over 'the instruments and means of production and distribution'.⁷⁵ However, it is pertinent to determine the nature of this ownership. Property of the Republic is the property of the public, not of the government. The government has an obligation for the proper management of these resources as a

⁶⁶ Stone (n 62).

⁶⁷ *Secretary of State for India v Raja Jyoti Prashad Singh Deo Bahadur* [1926] UKPC 18.

⁶⁸ *ibid.* 13.

⁶⁹ Stone (n 62).

⁷⁰ *Secretary of State for India in Council v Sri Raja Chelikani Rama Rao and others* (Madras) [1916] UKPC 58. Some reasonings of this case have been debated in D P O'Connell, 'Problems of Australian Coastal Jurisdiction' (1958) 34 *Brit YB Int'l L* 199.

⁷¹ The Constitution of India, art 294.

⁷² *ibid.*, art 297. The reference to EEZ was added in 1976; also, *Threesiamma Jacob v Geologist, Dptt. of Mining and Geology* <<https://indiankanoon.org/doc/156299343/>>

⁷³ The Constitution of the Islamic Republic of Pakistan, 1956, art 133 and 134(3); The Constitution of the Islamic Republic of Pakistan, 1962, art 146(2) and 232.

⁷⁴ Bangladesh Constitution, art 10.

⁷⁵ *ibid.*, art 13.

public trust property. As noted by Justice P Sathasivam of the Supreme Court of India that the ‘the word “vest” must be seen in the context of the Public Trust Doctrine (PTD). Even though this doctrine has been applied in cases dealing with environmental jurisprudence, it has its broader application.’⁷⁶ This is highly persuasive for Bangladesh considering the similarity of the relevant constitutional provisions and the shared common law tradition with India.

Public trust properties should be conserved and sustainably utilised considering the best interest of the public. In utilising these resources, the interest of the marginalised segments of the society must be given priority to attain ‘a just and egalitarian society’, as promised by the Constitution.⁷⁷ In the future exploitation of the resources of the marine area, Bangladesh must consider the environmental impact on the ocean. Even some of the most developed countries of the world failed to prevent serious marine pollution incidents in the offshore hydrocarbon industries. For example, the Deepwater Horizon incident in the US where ‘at least 5 million barrels of oil’ and ‘250,000 metric tons of natural gas’ were discharged into the sea, creating a severe environmental and ecological disaster.⁷⁸

The Public Trust Doctrine imposes an obligation on the government to consider environmental eventualities before allowing anyone for the exploitation of mineral resources from the marine area. Bangladesh’s own experience regarding major incidents, notably *Magurchara* and *Tengratila* (Sylhet division) blowouts, in the land-based gas fields operated by foreign enterprises should also be considered. The impacts of similar incidents on the ocean will be far greater than on land. Bangladesh should also consider the impact of climate change and other vulnerabilities of the marine area before planning its blue economic development.⁷⁹ As noted by the Supreme Court in a different context that the ‘coastal resources are most impacted by climate change...’.⁸⁰ The Court also highlighted the need for ‘stringent safeguards’, and application of ‘the principles of sustainable development’ in the same case.⁸¹ The Court rightly concluded that ‘[i]n case of doubt, however, protection of [the] environment would have precedence over the economic interest’.⁸²

⁷⁶ *Reliance Natural Resources Ltd. v Reliance Industries Ltd*, Civil Appeal No. 4274 of 2010 in the Supreme Court of India <<https://indiankanoon.org/doc/1070490/>>.

⁷⁷ Bangladesh Constitution, art 10.

⁷⁸ Samantha Joye, ‘Deepwater Horizon, 5 Years On: Baseline Environmental Data are Crucial for Understanding the Impacts of Oil Spills’ (2015) 349 *Science* 592.

⁷⁹ On the impact of climate change on the ocean and dependent communities, see Nathaniel L Bindoff et al., ‘Changing Ocean, Marine Ecosystems and Dependent Communities’ in Hans-Otto Pörtner et al. (eds), *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (IPCC 2019) 447.

⁸⁰ *Bangladesh Environmental Lawyers Association v Bangladesh* (2010) 30 BLD (HCD) 185, 191.

⁸¹ *ibid.* 192.

⁸² *ibid.*

17.6 Ocean-Dependent People, Marine Living Resources and the TWMZ Act

It is pertinent to examine how the Constitution safeguards the rights of the ocean-dependent people in the blue economic development process. A major concern is the right of the traditional fishing communities. The right to livelihood has been recognised as a part of the right to life.⁸³

The coastal State has sovereignty over territorial waters and sovereign rights over resources in the EEZ and continental shelf. One critical issue is whether article 143(1)(b) vests living resources (e.g., fish) of the territorial waters in the Republic. The difference between articles 143(1)(a) and 143(1)(b) is that the latter also vests the land in the Republic. Therefore, applying the *Cujus Est Solum Doctrine*, it can arguably be said that the living resources of the territorial waters are also vested in the Republic.⁸⁴ A counterargument may be that article 143(1)(b) vests only non-living resources in the Republic. For example, whether fish is treated as a 'thing of value' was debated in the Indian Constituent Assembly.⁸⁵ However, it must be noted that the entire debate in the Indian Constituent Assembly was in the context of sharing power between the Indian constituent states and the Union.⁸⁶ The term 'all lands, minerals and other things of value' in the constitutions of three subcontinental countries was most likely inspired by the pleadings of the 1947 *United States v California* case, where the main bone of contention was petroleum and mineral resources in the territorial waters.⁸⁷ This may indicate that the term is originally associated with non-living resources. Again, this case was also in the context of a conflict between central and state governments in a federal country.

The interpretation of article 143(1)(b) of the Bangladesh Constitution should be consistent with the entire constitutional scheme and the 'historic struggles' of the people for economic emancipation. Considering the egalitarian nature of the Constitution, the better interpretation is that the rights of the ocean dependent people for fishing and other livelihood activities have not been taken away by article 143(1)(b).

The sovereign ownership does not prevent the fishing rights of citizens in the territorial waters. The legal history of the people's fishing rights in the territorial waters may give some guidance. Under the English Common Law, fishing rights in the coastal waters were recognised by the Public Trust Doctrine.⁸⁸ In his 1889 Tagore Law Lecture, Lal Mohun Doss noted that the fishing rights in the territorial

⁸³ *Dr. Mohiuddin Farooque (Sekandar Ali Mondal) v Bangladesh* (1998) 50 DLR (HCD) 84, 100 (hereafter FAP 20 Case Merits).

⁸⁴ For example, *Attorney-General for the Province of British Columbia v Attorney-General for the Dominion of Canada* [1913] UKPC 63 (2 December 1913).

⁸⁵ Constituent Assembly Debates, Volume VIII (Lok Sabha Secretariat, Sixth Reprint 2014), 887–93.

⁸⁶ Generally, P Chandrasekhara Rao, *The New Law of Maritime Zones: With Special Reference to India's Maritime Zones* (Milind Publications 1983) 40–49.

⁸⁷ *United States v. California* 332 US 19 (1947) 22–23; Rao (n 86) 45.

⁸⁸ Archer and Jarman (n 8).

waters were judicially recognised in colonial India.⁸⁹ The fishing rights of citizens in the territorial waters and EEZ are also recognised in post-colonial India.⁹⁰ The constitutional provisions of India and Bangladesh are similar. The people's right to livelihood as part of the inalienable fundamental right to life⁹¹ should get full appreciation in the governance of the marine area as public trust property.

In Bangladesh, the original section 5(3) of the 1974 TWMZ Act recognised the fishing rights of artisanal fisherfolk who use non-mechanically propelled ships.⁹² This Act has been recently amended, which still retains the right of fishing by the citizens of Bangladesh.⁹³ This right is subject to the country's relevant laws, including the *Marine Fisheries Act, 2020*.⁹⁴

The TWMZ Amendment Act 2021 introduced many new provisions that fundamentally changed the 1974 Act.⁹⁵ The amended Act purports to cover various matters *inter alia* maritime zones and jurisdiction, extradition, maritime security, pollution prevention, ocean governance, blue economy, and conservation of resources.⁹⁶ Most of these highly technical issues are covered very hastily.

Some newly added sections of the Act are more of a policy statement than law, while some others are draconian. For example, section 22 of the Act has created several new offences,⁹⁷ most of which are grossly non-specific, giving unreasonable discretionary power to the executive. One of the newly created offences is: 'any activity affecting directly or indirectly the marine environment in coastal areas'.⁹⁸ Another one is the 'discharge of any types of pollutants or other substances that are prohibited by this Act'.⁹⁹ However, the Act does not specify any pollutant or substance but gives a very generic definition of marine pollution¹⁰⁰ copied from the UNCLOS.¹⁰¹ Arguably, very small scale pollution from an artisanal fishing boat may affect the marine environment. It also includes a very harsh punishment whereby any of the offences listed in section 22 will be punishable with

⁸⁹ Lal Mohun Doss, *The Law of Riparian Rights, Alluvion and Fishery* (Thacker, Spink and Co. 1891) 24.

⁹⁰ Kiran Jain, 'Right in Water-Based Resources' in Chhatrapati Singh (ed), *Water Law in India* (Indian Law Institute 1992) 33, 54.

⁹¹ FAP 20 Case Merits (n 83).

⁹² TWMZ Act, 1974, section 5 (this section is now replaced with a new section 5).

⁹³ TWMZ Act 1974, section 5A(2).

⁹⁴ Act No. XIX of 2020; Abdullah Al Arif and Md Saiful Karim, 'Marine Fisheries Act 2020 of Bangladesh: A Missed Opportunity for Sustainability and Collaborative Governance' (2022) 37 Int'l J Marine & Coastal L 337; Md Saiful Karim and Md Mahatab Uddin, 'Swatch-of-No-Ground Marine Protected Area for Sharks, Dolphins, Porpoises and Whales: Legal and Institutional Challenges' (2019) 139 Mar. Pollut. Bull. 275.

⁹⁵ For an introduction to the original Act see, Haque (n 15) 112–24.

⁹⁶ TWMZ Amendment Act, 2021.

⁹⁷ TWMZ Act 1974, section 22.

⁹⁸ *ibid.*, section 22(e).

⁹⁹ *ibid.*, section 22(c).

¹⁰⁰ *ibid.*, section 2(10).

¹⁰¹ UNCLOS, art 1(4).

imprisonment up to 3 years or a minimum fine of two crore taka or both.¹⁰² Would it be reasonable for an artisanal fisher to face imprisonment or a minimum two crore taka fine for a small-scale pollution?

Maritime security and marine pollution are covered by a series of technical legislation implementing International Maritime Organisation (IMO) legal instruments in other countries.¹⁰³ Bangladesh has yet to enact any proper national law for implementing major IMO legal instruments despite becoming a party to most of them.¹⁰⁴ Instead, this new amendment has tried to cover all marine pollution issues in a few sections in the vaguest possible manner.

Another drawback of the new law is the wholesale delegation of legislative power to the executive.¹⁰⁵ For example, sub-section 22(f) gives wide powers to the executive for creating further pollution-related offences without providing any policy direction.¹⁰⁶ The amended Act also indiscriminately delegates the legislative power to the executive in many other sections. A comprehensive review of this Act is not possible in this chapter. However, the TWMZ Amendment Act 2021 deserves a critical and comprehensive analysis and scrutiny.

17.7 Conclusion

The marine resources of Bangladesh are incredibly finite in per capita terms. Environmental and livelihood related rights of the people must be given paramount importance in the decision-making through an inclusive and participatory process with opportunities for grassroots voices. Any major offshore hydrocarbon or other mineral resources project must respect the fishing rights and other livelihood activities of the ocean dependent people. Moreover, the government should be fully mindful of its fiduciary duties for the conservation of the marine areas as a trustee under the Public Trust Doctrine. Precautionary measures should be taken for the protection of the marine environment if major resource exploitation activities are undertaken in the marine area of Bangladesh. Before allowing any future development in the marine area, establishing a regulatory regime based on the precautionary and polluter pays principles is also necessary.

¹⁰²TWMZ Act 1974, section 22.

¹⁰³On IMO legal instruments, see Md Saiful Karim, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organisation* (Springer 2015).

¹⁰⁴Md Saiful Karim, 'Implementation of the MARPOL Convention in Bangladesh' (2009) 5 *Macquarie J Int'l & Comp Envtl L* 51.

¹⁰⁵As noted by Denise Meyerson 'the conferral of unfettered power on the executive to make law creates the danger of the concentration of power in one branch of government – a danger which it is a primary purpose of the separation of powers doctrine to guard against', Denise Meyerson, 'The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie L.J.* 1.

¹⁰⁶On delegation of legislative power to the executive without policy directions, see Islam (n 26) 493–503.

References

Books

- Boyd, David R. 2012. *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*. Vancouver: UBC Press.
- Corrigan, Daniel P., and Markku Oksanen, eds. 2021. *Rights of Nature: A Re-examination*. London: Routledge.
- Doss, Lal Mohun. 1891. *The Law of Riparian Rights, Alluvion and Fishery*. Calcutta: Thacker, Spink and Co.
- Hepburn, Samantha. 2015. *Mining and Energy Law*. Melbourne: Cambridge University Press.
- Karim, Md Saiful. 2015. *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organisation*. Heidelberg: Springer.
- . 2018. *Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh*. Oxon/New York: Routledge.
- Knox, John H., and Ramin Pejman, eds. 2018. *The Human Right to A Healthy Environment*. Cambridge: Cambridge University Press.
- Rao, P. Chandrasekhara. 1983. *The New Law of Maritime Zones: With Special Reference to India's Maritime Zones*. New Delhi: Milind Publications.
- Rothwell, Donald, and Tim Stephens. 2010. *The International Law of the Sea*. Oxford: Hart Publishing.
- Stone, Gilbert. 1924. *Mining Laws of the British Empire and of Foreign Countries: Vol. VI British India*. His Majesty's Stationery Office.

Chapters in Edited Books

- Al Faruque, Abdullah, and Md Saiful Karim. 2016. Environmental Law of Bangladesh. In *Comparative Environmental Law & Regulation*, ed. Nicholas A. Robinson et al., vol. 7A, 1. Thomson Reuters.
- Bindoff, Nathaniel L., et al. 2019. Changing Ocean, Marine Ecosystems and Dependent Communities. In *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate*, ed. Hans-Otto Pörtner et al., 447. IPCC.
- Farooque, Mohiuddin. 2004. Some Aspects of the Law of the Sea and Bangladesh Practice: Myths and Misfits. In *Selected Writings of Mohiuddin Farooque: Environmental Order the Security of Survival*, 317. Dhaka: Bangladesh Environmental Law Association.
- Haque, Muhammad Ekramul. 2021. Constitutional Provisions Regarding Law of the Sea. In *Encyclopedia of Public International Law in Asia*, ed. Seokwoo Lee, 124. Brill/Nijhoff.
- . 2020. Bangladesh. In *Encyclopedia of Public International Law in Asia – Volume III: Central & South Asia*, ed. Seokwoo Lee, 90–109. Brill.
- Jain, Kiran. 1992. Right in Water-Based Resources. In *Water Law in India*, ed. Chhatrapati Singh, 33. Indian Law Institute.
- Turnipseed, Mary, et al. 2013. Using the Public Trust Doctrine to Achieve Ocean Stewardship. In *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law*, ed. Christina Voigt, 365. Cambridge University Press.

Articles

- Al Arif, Abdullah, and Md Saiful Karim. 2022. Marine Fisheries Act 2020 of Bangladesh: A Missed Opportunity for Sustainability and Collaborative Governance. *International Journal of Marine and Coastal Law* 37: 337.
- Archer, Jack H., and M. Casey Jarman. 1992. Sovereign Rights and Responsibilities: Applying Public Trust Principles to the Management of EEZ Space and Resources. *Ocean & Coastal Management* 17: 253.
- Atapattu, Sumudu. 2002. The Right to a Healthy Life or the Right to Die Polluted: The Emergence of a Human Right to a Healthy Environment under International Law. *The Tulane Environmental Law Journal* 16: 65.
- Bhuiyan, Md Azhar Uddin. 2021. The Doctrine of Public Trust: Its Judicial Invocation in Bangladesh and the Future Potentials. *Jahangirnagar University Journal of Law* 9: 89–108.
- Bradbrook, Adrian J. 1988. Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claims to Natural Resources Located Above and Beneath the Land. *Adelaide Law Review* 11: 462.
- Harden-Davies, Harriet, et al. 2020. Rights of Nature: Perspectives for Global Ocean Stewardship. *Marine Policy* 122: 10405.
- Hussain, M. Gulam, et al. 2018. Major Opportunities of Blue Economy Development in Bangladesh. *Journal Indian Ocean Regulation* 14: 88.
- Joye, Samantha. 2015. Deepwater Horizon, 5 Years On: Baseline Environmental Data are Crucial for Understanding the Impacts of Oil Spills. *Science* 349: 592.
- Karim, Md Saiful. 2009. Implementation of the MARPOL Convention in Bangladesh. *Macquarie Journal of International and Comparative Environmental Law* 5: 51.
- Karim, Md Saiful, et al. 2012. Legal Activism for Ensuring Environmental Justice. *The Asian Journal of Comparative Law* 7: 346.
- Meyerson, Denise. 2004. The Rule of Law and the Separation of Powers. *Macquarie Law Journal* 4: 1.
- Stone, Christopher D. 1972. Should Trees Have Standing--Toward Legal Rights for Natural Objects. *The Southern California Law Review* 45: 450.
- Sylvan, J.C. 2006. How to Protect a Coral Reef: The Public Trust Doctrine and the Law of the Sea. *The Journal of Sustainable Development Law and Policy* 7: 32.
- Thaler, Jeffrey, and Patrick Lyons. 2014. The Seas Are Changing: It's Time to Use Ocean-Based Renewable Energy, Public Trust Doctrine, and a Green Thumb to Protect Seas from Our Changing Climate. *The Ocean and Coastal Law Journal* 19: 241.

Documents

- Bangladesh Territorial Waters and Maritime Zones Act, 1974, Act No. XXVI of 1974. Constituent Assembly Debates, Volume VIII (Lok Sabha Secretariat, Sixth Reprint 2014).
- Good Practices on the Right to A Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/43/53 (30 December 2019).
- Human Right to A Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/RES/48/13 (18 October 2021).
- Petroleum (Production) Act 1934 (UK).
- Territorial Waters and Maritime Zones (Amendment) Act, 2021, Act No. XXIX of 2021.
- UN Convention on the Law of the Sea, 1982 (UNCLOS) 1833 UNTS 3.
- UN Environment Programme, 5 Reasons Why a Healthy Ocean is Linked to Human Rights (09 December 2021). <https://www.unep.org/news-and-stories/story/5-reasons-why-healthy-ocean-linked-human-rights>. Accessed 7 Jan 2022.

Md Saiful Karim is an Associate Professor in the School of Law at Queensland University of Technology in Brisbane, Australia. He teaches and researches in various areas of ocean, maritime security and environmental law. He has published extensively in the fields of ocean and environmental law and has presented research papers at numerous conferences and workshops organised by various academic organisations based in Asia, Europe, North America and Oceania. He is the author of *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organisation* (Springer, 2015), *Maritime Terrorism and the Role of Judicial Institutions in the International Legal Order* (Brill-Nijhoff, 2017) and *Shipbreaking in Developing Countries: A Requiem for Environmental Justice from the Perspective of Bangladesh* (Routledge, 2018). The Australian Government nominated Dr. Karim in several important global expert bodies. He is a lead author of the *Intergovernmental Panel on Climate Change Special Report on the Ocean and Cryosphere in a Changing Climate*. He is also a lead author of the first *Global Assessment and the first Asia Pacific Regional Assessment of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*.

Chapter 18

Digital Constitutionalism in Bangladesh to Protect Right to Privacy in the Big Data Regime



Md Saimum Reza Talukder

Abstract This chapter examines the emergence, effect, and influence of ‘Big Data’ disseminating through the information superhighway of the Internet on human life, particularly the right to privacy and associated fundamental freedoms that the national constitution of every country and international law purport to protect. The extent to which the Constitution of Bangladesh faces and counteracts the new challenges posed by the rapidly changing environment of digital technologies is investigated. The chapter argues that the human right to privacy is in danger because the Big Data regime collects, stores, and processes private information in an unnecessary and careless manner regardless of their marginalising effect on the right to privacy. It calls upon the human rights-based international law and digital constitutionalism to join forces for the protection of the right to privacy in the digital sphere.

Keywords Digital constitutionalism · Big data · Internet · Right to privacy · Digital technology · Protection · International law

18.1 Introduction

In the increasingly digital world we live in, the ‘Internet of Things’ constantly creates, stores, analyses, and monetises¹ very personal information about us, builds profiles about us, and spreads that information to multiple stakeholders with political, social, or commercial interests over the Internet. For instance, the zettabytes of data generated annually by the various sensor technologies included in

¹ Mireille Hildebrandt, ‘Slaves to Big Data. Or Are We?’ in *Selected Works of Mireille Hildebrandt*, 2013 <https://works.bepress.com/mireille_hildebrandt/52/> accessed 14 November 2022.

Md S. R. Talukder (✉)
School of Law, BRAC University, Dhaka, Bangladesh
e-mail: msrtalukder@bracu.ac.bd

gadgets. In 2011, it was estimated that this digital universe² produced more than 1.8 zettabytes (1.8 trillion gigabytes) of data. This is comprehensible given that about 127 new devices are added to the Internet, worldwide, every second,³ nearly 216,000 photographs, 278,000 Tweets, and 1.8 million Facebook likes that are shared every minute.⁴ And this massive amount of data, known as ‘Big Data’, has become so important to people’s rights to privacy and other interconnected fundamental freedoms that are protected by national constitutions.

The collection and analysis of a sizable amount of structured and unstructured data using computational methods or algorithms to find models and correlations that lead to predictive analysis or automated decisions are known as Big Data in the information society.⁵ However, Big Data has effects on politics, the economy, society, and culture that go beyond its technical meaning. It may offer serious hazards to the privacy⁶ and security of personal information, according to the Economist article ‘Data is the New Oil’.⁷ In the algorithmic civilisation, processing enormous amounts of data becomes a fundamental and limitless source of values, much like oil was for the industrial economy.⁸

The McKinsey Global Institute coined the term ‘Big Data’ in 2011 and described it as data sets whose size exceeds a database’s capacity to collect, store, manage, and analyse data and information.⁹ In any quantitative empirical research, we no longer need to refer to a sample since, according to Hildebrandt, Big Data implies that ‘ $n = \text{all}$ ’, which means that we would be researching all the instances of whatever it is we wish to investigate.¹⁰ However, ‘Big Data is not about the data’ alone;

²John Gantz and David Reinsel, ‘Extracting Value from Chaos’ IDC iView, 2011) <<http://www.emc.com/collateral/analyst-reports/idc-extracting-value-from-chaos-ar.pdf>> accessed 14 November 2022.

³Miss Smith, ‘127 devices added to the Internet each second, but Congress is clueless about IoT’, CSO Online, 2015 <<https://www.csoonline.com/article/2942596/127-devices-added-to-the-internet-each-second-but-congress-is-clueless-about-iot.html>> accessed 14 November 2022.

⁴Victoria Woollaston, ‘Revealed, what happens in just ONE minute on the internet: 216,000 photos posted, 278,000 Tweets and 1.8 m Facebook likes’, MailOnline, 2013 <<http://www.dailymail.co.uk/sciencetech/article-2381188/Revealed-happens-just-ONE-minute-internet-216-000-photos-posted-278-000-Tweets-1-8m-Facebook-likes.html>> accessed 14 November 2022.

⁵De Giovanni Gregorio, ‘Digital Constitutionalism, Privacy and Data Protection’ in *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022) 216.

⁶Article 29 Data Protection Working Party, ‘Opinion 03/2013 on purpose limitation’ (2013) European Commission 00569/13/EN WP203 <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf> accessed 14 November 2022.

⁷‘The World’s Most Valuable Resource is no Longer Oil, but Data’ *The Economist* (London, 6 May 2017) <<https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>> accessed 14 November 2022.

⁸Gregorio (n 5).

⁹James Manyika et al., ‘Big Data: The Next Frontier for Innovation, Competition, and Productivity’ (McKinsey & Company, 2011) <<https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/big-data-the-next-frontier-for-innovation>> accessed 14 November 2022.

¹⁰Hildebrandt (n 1) 12.

it goes beyond a tripartite combination of cutting-edge statistical techniques, cutting-edge computer science, and creative theories in the field of practical application.¹¹

According to Arthur Muller ‘privacy is difficult to define because it is exasperatingly vague and evanescent’.¹² Warren and Brandies described privacy as the ‘general right to be let alone’.¹³ Westin described it as ‘voluntary, temporary withdrawal of a person from society through physical or psychological methods, whether in solitude or close group relationships or in a state of secrecy or reserve when interacting with larger groups’.¹⁴

In the present day, constitutionalism rotates around the idea of limiting the power of government,¹⁵ promoting democratic values,¹⁶ and protecting human rights and the rule of law.¹⁷ Eduardo Celeste defines ‘digital constitutionalism’ as ‘a concept to explain the recent emergence of constitutional counteractions against the challenges produced by digital technologies. The ideology is what transforms the values of contemporary constitutionalism into the digital society’.¹⁸ Celeste contends that rather than defining the normative responses to the problems presented by digital technology, digital constitutionalism embodies the set of ideas and values that underpin and direct such responses. On the other hand, it is possible to view the newly developed normative reactions as being a part of a process of constitutionalising the digital environment.¹⁹ So, it can be said that by focusing on the particular context impacted by the development of digital technology, digital constitutionalism adheres to the same core principles and goals as modern constitutionalism. According to the latest position taken by Redeker, Gill and Gasser, the phrase ‘Internet bill of rights’ can serve as ‘intellectual building blocks for the constitutional materials of the digital world’ and is used to describe a comprehensive set of Internet-specific rights, values, and governance standards.²⁰

¹¹ Gary King, ‘Preface: Big Data Is Not about the Data!’ <https://gking.harvard.edu/files/gking/files/prefaceorbigdataisnotaboutthedata_1.pdf> accessed 14 November 2022.

¹² Daniel J Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087.

¹³ Samuel D Warren & Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

¹⁴ Alan F Westin, ‘Privacy and Freedom’ (1968) 25 *Washington and Lee Law Review* 166.

¹⁵ Sajó András and Stephen Holmes, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, Budapest, 1999).

¹⁶ Dieter Grimm, ‘The Achievement of Constitutionalism and Its Prospects in a Changed World’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP, 2010) 3–22.

¹⁷ Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (*Georgetown Law: The Scholarly Commons*, 17 March 2010) <<https://scholarship.law.georgetown.edu/hartlecture/4/>> accessed 14 November 2022.

¹⁸ Edoardo Celeste, ‘Digital Constitutionalism: A New Systematic Theorisation’ (2019) 33 *International Review of Law, Computers & Technology* 76.

¹⁹ *ibid.*

²⁰ Dennis Redeker, Lex Gill, and Urs Gasser, ‘Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights’ (2018) 80 *International Communication Gazette* 302.

Article 12 of the Universal Declaration of Human Rights, 1948 (UDHR) and article 17 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) not only ensure the right to privacy, but also ensure protection against arbitrary or unlawful interference against family, home, and correspondence. Article 43 of the Constitution of Bangladesh guarantees a citizen the privacy of correspondence and other means of communication, as one of the fundamental rights that is judicially enforceable to protect the right to privacy. In safeguarding the right to privacy under the Big Data regime, this chapter investigates the digital constitutionalism strategy Bangladesh is using and makes the case that the 'right to privacy' is in danger because Big Data is being collected, stored, and processed in an unnecessary and careless manner. International law that is founded on human rights can defend the right to privacy from such dangers. Digital constitutionalism assures the rights-based protection of the right to privacy in the digital sphere.

18.2 Right to Privacy in the Big Data Regime

Is Big Data enslaving humans or keeping an eye on them as a 'Big Brother'? In the interpretation of George Orwell's 'Big Brother' allegory, Solove compared cyberspace to a panopticon.²¹ The Internet of things is acting as a panopticon, allowing big brothers (states, governments, business titans with vested interests etc) to secretly monitor the family (society, people etc).²² In this digital age, where massive amounts of data are generated, stored, and processed every second, leaving both fingerprints and footprints.²³ According to Abelson, the ability to conduct fine-grained monitoring has increased due to advances in processing power, yet the policy paradox is that we accept the loss of privacy in exchange for effectiveness, convenience, and slight price breaks.²⁴ And it is not just about data collecting; we frequently give out information about ourselves online, whether deliberately or unknowingly. By connecting to the Internet, we not only have access to an infinite amount of information, but also turn into that information, leaving us open to new kinds of watching, monitoring, and following.²⁵ As a result, John Perry Barlow's tech-utopian vision of 'Declaration of the Independence of Cyberspace' has lost its luster, and the Internet is on the verge of collapse.²⁶

²¹ Daniel J Solove, *Digital Person: Technology and Privacy in the Information Age* (New York University Press 2006).

²² Solove (n 12).

²³ Hal Abelson, Ken Ledeen K and Harry Lewis, *Blown to Bits: Your Life, Liberty, and Happiness After the Digital Explosion* (Pearson 2008).

²⁴ Ibid.

²⁵ Sheila Jasanoff, *The Ethics of Invention: Technology and the Human Future* (WW Norton & Company 2016).

²⁶ John Naughton, 'Has the Internet Become a Failed State?' *The Guardian* (27 November 2016) <<https://www.theguardian.com/technology/2016/nov/27/has-internet-become-failed-state-crime-cyberspace>> accessed 14 November 2022.

The ‘consent dilemma’²⁷ is one of the main causes of voluntary data sharing. People are not very good at managing their own privacy (PSM), and as a result, they are heavily influenced by paternalism, which makes decisions on behalf of individuals.²⁸ Additionally, this individual decision-making eliminates the option to agree to any specific user. Since individuals have ‘bounded rationality’, it is problematic when internet behemoths like Google, Facebook, and Twitter store vast amounts of user data and appear to control social worth. Mark Zuckerberg stated that privacy was no longer a ‘social norm’ in 2010.²⁹ This idea that privacy is no longer a ‘social norm’ is somewhat unsettling, especially when it comes to privacy issues. It raises the question of whether or not we are subject to control by their data processing, either voluntarily or accidentally, because such powerful people have a tendency to reinterpret societal norms and strive to erode people’s privacy for business profits for their corporations. Another issue is that big data technologies may place people in ideologically or culturally exclusive communities known as ‘filter bubbles’ that effectively shield them from information that contradicts their preconceived notions or biases.³⁰ Abelson correctly noted:

[T]he matter is that as a society, we don’t really know how to deal with these consequences of the digital explosion. The technology revolution is outstripping society’s capacity to adjust to the changes in what can be taken for granted.³¹

By becoming overly dependent and losing their capacity for reason, the ‘data subjects’ (individuals from whom data is being collected or extracted) are gradually made into slaves to those technological advancements, which opened the door for Dataveillance. Data is no longer just a tool; it has evolved into a brand-new surveillance technique that relies on fact-finding and data collection rather than the naked eye or a camera.³² The information technology expert *Roger Clarke* defines Dataveillance as ‘Dataveillance is the systematic use of personal data systems in the investigation or monitoring of the actions or communications of one or more persons’.³³ Additionally, when surveillance is widespread and public, it has negative effects. Public surveillance, in Nissenbaum’s opinion, infringes on a person’s

²⁷ Daniel J Solove, ‘Privacy Self-Management and the Consent Dilemma’ (2013) 126 *Harvard Law Review* 1880.

²⁸ Solove (n 12).

²⁹ Bobbie Johnson, ‘Privacy No Longer a Social Norm, Says Facebook Founder’ *The Guardian* (11 January 2010) <<https://www.theguardian.com/technology/2010/jan/11/facebook-privacy>> accessed 14 November 2022.

³⁰ ‘Big Data: Seizing Opportunities, Preserving Values’ (The White House, May 2014) <https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf> accessed 14 November 2022.

³¹ Hildebrandt (n 1) 12.

³² Hildebrandt (n 1) 12.

³³ Roger Clarke, ‘Information Technology and Dataveillance’ (Roger Clarke’s Website) <<http://www.rogerclarke.com/DV/CACM88.html>> accessed 14 November 2022.

right to privacy since it tramples on their sense of integrity; as a result, it amounts to injustice and even tyranny.³⁴ Clarke reiterates:

In the third era of dataveillance, the dominant mode of operation would appear to be cooperation among peers, rather than master-slave relationships (or markets rather than hierarchies, to use a piece of academic jargon). The centralist, authoritarian tendencies which appeared to be inherent in computers is giving way to dispersed power. In the new context, there may be more danger of anarchy and ungovernability than of repression by a powerful State.³⁵

Therefore, this period of dataveillance may be called the ‘Big Data regime’, where Big Brother is constantly watching us via a cyberspace equivalent of a panopticon and leaving people in a consent dilemma. As with any oppressive government, the people are always dictated by the Dictator. Hildebrandt has rightly said:

Mayer-Schönberger & Cukier suggest that we are on the verge of *data dictatorship*, meaning that we become incapable of perceiving reality outside the mediation of Big Data techniques and technologies. The authors thus propose that data, data mining, machine-to-machine communication and computational decision systems may soon take over [emphasis added].³⁶

This data dictatorship implies ‘n = all’,³⁷ leaving no parts of our public and private life untouched, making it more perilous for anarchy and ungovernability than repression by a strong State. Through the use of ‘Artificial Intelligence with the power to be interactive, autonomous, and adaptive’,³⁸ Big Data has assumed the role of the dictator in this situation. Through this process, ‘machines are indeed learning, at great speed, and both differently and similarly as we do’.³⁹ Thus, ‘n = all’ has made it possible for machine knowledge to expand, which encourages more ‘datafication’ – a process of converting the flux of life into distinct, machine-readable, quantifiable, and manipulable bits and bytes is referred to as ‘datafication’.⁴⁰ In the derogatory sense of skilfully, unjustly, or unscrupulously controlling or influencing a person or situation, this ‘capacity to manipulate bits and bytes may result in the capability to manipulate a person’.⁴¹ It may therefore be asserted that the Data dictatorship is ‘enslaving’ the data subjects – the people. The Big Data regime is endangering the right to privacy in this way. The FAANGs (Facebook, Alphabet, Amazon, Netflix, Google etc) have been referred to as the new ‘Data Oligarchs’⁴²

³⁴ Helen Nissenbaum, ‘Privacy as Contextual Integrity’ (2004) 79 *Washington Law Review* 119.

³⁵ Roger Clarke, ‘The Eras of Dataveillance’ (Roger Clarke’s Web-site) <<http://www.rogerclarke.com/DV/NotesDVEras.html>> accessed 14 November 2022.

³⁶ Hildebrandt (n 1) 12.

³⁷ *ibid.*

³⁸ Luciano Floridi and JW Sanders, ‘On the Morality of Artificial Agents’ (SSRN, 20 May 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3848388> accessed 14 November 2022.

³⁹ Hildebrandt (n 1) 5.

⁴⁰ *ibid.* 6.

⁴¹ *ibid.*

⁴² *ibid.*

because of their strong ability to ‘read’ people and manipulate their consensus by gathering Big Data through various Internet of Things. Such an Oligarchy can influence the economy, politics, and culture through its nudging impact because it is benign, opaque, and intrusive. As such, it is up to the individuals to defend their right to privacy as well as their reputation and dignity. The question is: What should the guiding principles be in this Big Data regime to guarantee the right to privacy?

18.3 Rights-Based Principles to Protect Right to Privacy in the Big Data Regime

The ‘Holy Grail’ of Big Data lies in the various categories of ‘personal’ or ‘unpersonal’ data that demand various levels of legal protection.⁴³ An overarching goal and guiding principle for achieving the law’s objectives should exist before it is put into effect. Whether the right to privacy is upheld in the digital world is the subject of debate. The UN Human Rights Council Resolution on ‘the promotion, protection and enjoyment of human rights on the Internet’ states that

...[T]he same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights....⁴⁴

Protecting the inherent human dignity and freedom will always be guided by the UDHR and its preamble lays

[F]aith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,....

Social advancement and higher living standards are impossible to attain without a real guarantee of the right to privacy since the Big Data regime may infringe on people’s intrinsic freedom and dignity. Additionally, ‘arbitrary interference with private’ is expressly prohibited by UDHR article 12 and ICCPR article 17 (1) maintain that ‘[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’. Therefore, protecting one’s privacy also involves protecting his/her honor and reputation in addition to protecting person, family, and home. A broad and extensive international framework that safeguards the individual, family, home, honor, and reputation is crucial for social progress and improved quality of life.

The Fair Information Practice Principles (FIPP) are yet another set of guidelines that should be regarded as crucial for safeguarding citizens’ privacy. Since

⁴³ *ibid.* 10.

⁴⁴ UN Doc A/HRC/32/L.20 (2016) <<https://digitallibrary.un.org/record/845728?ln=en>> accessed 14 November 2022.

information security is a crucial component of privacy, FIPP includes the following principles: (1) Access and amendment, (2) Accountability, (3) Authority, (4) Minimization, (5) Quality and integrity, (6) Individual participation, (7) Purpose specification and use limitation, (8) Security, and (9) Transparency.⁴⁵ The 'OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data' include more specific elements of safeguarding the privacy of citizens, including the following eight principles⁴⁶:

1. Collection limitation: Personal information should only be gathered when necessary, with the subject's knowledge or consent, and only within the parameters set forth by law and ethical principles.
2. Data quality: Personal information must only be used for legitimate purposes and it must be accurate, complete, and kept up to date to the extent necessary for those objectives.
3. Purpose specification: Personal data should only be used for the purposes for which they were originally obtained, as well as any additional purposes that are not inconsistent with those original purposes and are disclosed each time a new purpose is specified.
4. Use limitation: Personal data may not be shared, made accessible, or used in any other way for purposes other than those specified in accordance with the purpose specification principle, with the following exceptions: with the consent of the data subject, or by the authority of law.
5. Security safeguards: To safeguard personal data against risks like theft or unauthorised access, destruction, use, modification, or disclosure, reasonable security measures should be implemented.
6. Openness: There should be a general policy of openness regarding changes, procedures, and regulations pertaining to personal data. The existence, nature, and main purposes of personal data, and the identity and usual residence of the data controller, should all be easily ascertainable.
7. Individual participation: Individuals should have the right:
 - (a) to learn whether or not a data controller has information about them by asking the data controller directly or in another way;
 - (b) to have data about them conveyed to them in a way that is (i) within a reasonable time, (ii) at a cost that is not exorbitant, (iii) in a reasonable manner, and (iv) in a form that is easily understood by them;
 - (c) the right to challenge a denial and receive justification if a request made in accordance with subparagraphs (a) and (b) is denied; and
 - (d) to contest any information pertaining to them, and if the contest is successful, to have the information removed, corrected, finished, or amended.

⁴⁵ Fair Information Practice Principles (1973), The Federal Privacy Council of the US <<https://www.fpc.gov/resources/fipps/>> accessed 14 November 2022.

⁴⁶ OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980) <<https://www.oecd.org/sti/economy/2013-oecd-privacy-guidelines.pdf>> accessed 14 November 2022.

8. Accountability: A data controller should be accountable for adhering to procedures that carry out the aforementioned guidelines.

The primary responsibility for upholding the standards and principles of human rights ultimately rests with the States. In order to protect people's right to privacy from the Big Data regime, the State needs to have efficient measures in place. The framework of General Data Protection Regulations (GDPR) of the European Union may well be an example of such effective mechanisms by States despite many obstacles and loopholes. Its article 4 (1) describes personal data as 'any information relating to an identified or identifiable natural person' and GDPR terms this natural person as the 'data subject'.⁴⁷ For better protection of personal data, GDPR imposes the following new obligations: (a) Obligation of data protection by design and by default (Art. 25), (b) Obligation to notify data breaches to supervisory authorities (Art. 33) and to data subjects (Art. 34), (c) Obligation to perform data protection impact assessment (Art. 35), and (d) Obligation to install a data protection officer (Art. 37). Its article 5 also maintains that there is 'purpose limitation' to collect personal data which requires that personal data must be collected for 'specified, explicit and legitimate' purposes, and not to be 'further processed in a way incompatible' with those purposes.⁴⁸ Article 6 further obliges that the 'consent' taken from the data subjects must be 'informed consent' in that the consent must be free, informed, specific, and unambiguous; and can be withdrawn at any time.⁴⁹

18.4 Digital Constitutionalism

According to Fitzgerald, the exercise of power is shared between public and private actors in the Information Society, which he sees as international, intangible, non-territorial, and decentralised, requiring a mixed governance structure combining self-regulation by private sectors and oversight by public institutions.⁵⁰ Private sector exercises self-regulation by regulating the code of software, and public sector plays important role in governance level because it can exercise coercive power. Fitzgerald uses the terms 'Informational Constitutionalism' or 'Informational Law'

⁴⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council 27 April 2016: on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), (2016) *Official Journal of the European Union* <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>> 10 July 2022.

⁴⁸ Also, article 29 Data Protection Working Party (n 6).

⁴⁹ *Handbook on European data protection law* (FRA: European Union Agency for Fundamental Rights, 2018) <<https://fra.europa.eu/en/publication/2018/handbook-european-data-protection-law-2018-edition>> accessed 14 November 2022.

⁵⁰ Brian Fitzgerald, 'Software as Discourse? A Constitutionalism for Information Society' (1999) 24 *Alternative Law Journal* 144.

that denotes the law of the State.⁵¹ According to Professor Lessig's 'Code is Law' idea, there are four interrelated and interdependent modalities that govern cyberspace, namely market, norms, laws, and code.⁵² One can control the other three modalities by writing new code or altering old code, which will ultimately alter the way that cyberspace operates, including how people behave. Following Lessig, Berman recognises the private sector's ability to define code as a powerful regulatory instrument for cyberspace.⁵³

Berman proposes the term 'constitutive constitutionalism' as an alternative solution to bypass the state action doctrine to regulate cyberspace. According to him, constitutional adjudication should be extended to private actors in cyberspace instead of using ordinary law.⁵⁴ In this way, courts can use the constitution as a benchmark for developing fundamental values, solving politically demanding questions, and encouraging people to engage in these issues. Constitutional law naturally is inclined to establish general principles, while the objectives of ordinary legislation would be limited to the regulation of problems of daily life.⁵⁵

Suzor coined the term 'digital constitutionalism' by recognizing the role of private actors' power in the regulation of virtual communities.⁵⁶ Referring to both Fitzgerald and Berman, Suzor states that digital constitutionalism seeks to articulate a set of limits on private power in the context of virtual communities.⁵⁷ Suzor takes a broad definition of virtual communities in this article, including all types of online social media platforms.⁵⁸ Additionally, Suzor hypothesized that the governance structure of virtual communities would combine public and private power without suggesting a hierarchy between the two.⁵⁹

Karavas studied a decision of a German court concerning the ban of a user from a chat room.⁶⁰ Because the platform's owner had not previously established any guidelines regarding chat usage, the judges decided that the user be reintegrated into the forum. What is significant in this decision is that the German court relied not on any constitutional interpretation by invoking fundamental rights, eg freedom of expression, but referred to the general principle of good faith provided by the

⁵¹ *ibid.*

⁵² Lawrence Lessig, *Code and Other Laws of Cyberspace: Version 2.0* (Basic Books 2006).

⁵³ Paul S Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private' Regulation' (2000) 71 *University of Colorado Law Review* 1263.

⁵⁴ Celeste (n 18).

⁵⁵ Berman (n 53).

⁵⁶ Nicolas Pierre Suzor, 'Digital Constitutionalism and the Role of the Rule of Law in the Governance of Virtual Communities' (PhD thesis, Queensland University of Technology, Australia, 2010) <<https://eprints.qut.edu.au/37636/>> accessed 14 November 2022.

⁵⁷ Suzor (n 56).

⁵⁸ *ibid.*

⁵⁹ Celeste (n 18) 9.

⁶⁰ LG Bonn [1999] 10 O 457/99, *openJur* [2011] 77972 <<https://openjur.de/u/150000.html>> accessed 14 November 2022.

German Civil Code.⁶¹ Instead of interpreting this case as a private law dispute, Karavas saw it as proof of a specific kind of constitutionalism.⁶² The central argument of Karavas is that German judges impliedly recognised the failure of constitutionalisation of cyberspace. Therefore, the judges were supporting a sort of ‘maieutic’ attitude, which Karavas understood to be a ‘bottom-up’ and ‘incremental’ constitutionalisation process supported by other societal sub-sectors other than the State.⁶³ Karavas argued that state politics are no longer entirely capable of controlling the complexity of a divided and plural society, such as cyberspace, and as a result, he endorsed Tuebner’s notion of the rise of ‘civil constitutions’.⁶⁴ According to Edoardo, Suzor and Karavas seem to be the two sides of the same coin as they both recognised the possibility of self-regulation of private actors. However, Suzor thinks that state values should guide this self-regulation, while Karavas thinks that societal sub-sectors are now capable of leading their own constitutionalisation process.⁶⁵

Gill, Redeker, and Gasser published a working paper on ‘digital constitutionalism’ in 2015.⁶⁶ They brought up the idea of ‘bill of rights for the internet’. They contend that various documents that have been written in the last 25 years that have an impact on internet users’ rights diverge significantly from the traditional constitutional principles. This Internet Bill of Rights can be compared to a constitution even if it is not a traditional constitution. This Internet Bill of Rights shares the ‘fundamental substantive elements’ of constitutionalism, including its ideals, difficulties, and guiding principles, as well as its primary goals of stifling government authority and strengthening institutions’ relationships with society.⁶⁷ However, it is also a matter of concern as to how far the standards and guidelines envisaged in the Internet Bills of Rights have been institutionalised and whether the entire document has acquired a binding legal standing. However, Teubner says that even if the Internet Bill of Rights is not legally binding, higher sources of the legal system do acknowledge its norms and concepts.⁶⁸

Thus, the body of available literature does not provide a comprehensive understanding of the idea of digital constitutionalism. However, Edoardo summarises it as ‘Fitzgerald entrusts a constitutionalising role to private law, Berman to

⁶¹ Celeste (n 18) 9.

⁶² Vagias Karavas, ‘Governance of Virtual Worlds and the Quest for a Digital Constitution’ in Christoph B Graber and Mira Burri-Nenova (eds), *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries* (Edward Elgar, 2010) ch 6.

⁶³ *ibid* 168.

⁶⁴ Celeste (n 18) 9.

⁶⁵ *ibid.* 10.

⁶⁶ Redeker (n 20).

⁶⁷ *ibid.* 23.

⁶⁸ Gunther Teubner, Gunther, ‘Societal Constitutionalism; Alternatives to State-Centred Constitutional Theory?’ in Christian Joerges, Inger-Johanne Sand, and Gunther Teubner (eds), *Transnational Governance and Constitutionalism. International Studies in the Theory of Private Law* (Hart Publishing, 2004) sec I(1).

constitutional law, Suzor to a private law informed by the principles of constitutional law, Karavas to norms produced by private actors, and finally Redeker, Gill and Gasser to the documents of Internet bill of rights'.⁶⁹

18.5 Digital Constitutionalism in Bangladesh to Protect the Right to Privacy

Article 25 of the Constitution of Bangladesh says that Bangladesh shall base its international relation on the principles of 'respect for international law and the principles enunciated in the United Nations Charter'. Bangladesh is a ratifying member of the UN Charter and several international conventions or covenants on human rights including ICCPR.⁷⁰ So, it is a constitutional duty of Bangladesh to abide by the international principles on privacy discussed in sect. III.

The Constitution of Bangladesh does not give a comprehensive definition of the right to privacy. However, article 43 ensures protection, subject to reasonable restrictions imposed by law, to the privacy of a citizen's correspondence and other means of communication. What is significant here is that, the Constitution mentions citizens, not people or human. So, it is not clear whether such privacy of correspondence extends to non-citizens, for example the persecuted and stateless Rohingya refugees in Bangladesh. Moreover, such privacy of correspondence is subject to some reasonable restrictions imposed by law. Article 43 mentions interests of the security of the State, public order, public morality or public health etc. as the grounds for invoking such reasonable restrictions. But do these grounds comply with the essence of privacy protection in ICCPR article 19 (3)? Because according to the UN Special Rapporteur Frank La Rue report on the 'Promotion and Protection of the Right to Freedom of Opinion and Expression',⁷¹ freedom of expression, which includes freedom to seek, receive, and impart information, can be curtailed reasonably on the following criteria:

1. Principle of necessity and legitimate aim: whether the restriction is necessary and has the support of the people;
2. Principle of proportionality: whether the measures taken are proportionate to the gravity of the offense; and

⁶⁹Celeste (n 18) 12.

⁷⁰Muhammad Ekramul Haque, 'Constitutional Status of International Law in Bangladesh' in Seokwoo Lee (ed), *Encyclopedia of Public International Law in Asia* (Brill/Nijhoff, 2021) 13–14; Muhammad Ekramul Haque, 'Status of International Law in the Legal System of Bangladesh' in Seokwoo, *ibid.* 19–30.

⁷¹Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Human Rights Council, UN Doc A/HRC/17/27 (2011) <https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf> accessed 14 November 2022.

3. Principle of legality: whether the restriction is imposed as per existing laws that are well-defined and comprehensive.

According to article 104 of the Constitution, the Appellate Division of the Supreme Court of Bangladesh (AD) ‘shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it’. Under article 106 of the Constitution, the President of Bangladesh can ask for an opinion of the Supreme Court on the question of law which has public importance. Article 102 of the Constitution gives powers to the High Court Division of the Supreme Court (HCD) to issue certain orders and directions, either upon receiving a writ petition from the aggrieved person(s), or it can act suo motu if any fundamental right is violated. So, the Constitution provides scope for judicial review, and can exercise judicial activism to secure the right to privacy both online and offline.

In *Aynunnahar Siddiqua and Others. vs. Government of Bangladesh and Others*, the Supreme Court of Bangladesh held that

...So the police force must be well-prepared and well-equipped to deal with the rising wave of crime, militancy and terrorist activities which has put the lives of the citizenry in jeopardy. But at the same time, the police must ensure that the citizenry are free from any unwarranted interference with their right to privacy and free movements in the country...⁷²

In the *State and Others v. Oli and Others*, the Supreme Court of Bangladesh said that-

...We must not forget that the citizens’ right to privacy in correspondence and other means of communication is guaranteed under article 43 of the Constitution which cannot be easily violated at the instance of any interested quarter....⁷³

In 2021, a local court in Jhenaidah district of Bangladesh stepped to defend a man who was the victim of a local public official’s abuse of power and emphasised that even when filing charges under the Digital Security Act 2018 of Bangladesh, a citizen’s right to privacy must not be abused. The court noted that

A false or defamatory information will only be treated as a crime only if it gets published. But end-to-end encrypted messaging is not meant for publishing. Rather, the Constitution guarantees the personal privacy of citizens,...⁷⁴

Thus, there appears to be a trend of ‘constitutive constitutionalism’, developed by Berman, has been followed in Bangladesh. Courts are using the Constitution as the benchmark to develop fundamental values, solve politically demanding questions,

⁷² (2017) 37 BLD 181.

⁷³ (2019) Death Reference 61/2011 (with Criminal Appeal 6592 of 2011 with Jail Appeal 50 of 2012 with Criminal Miscellaneous 50,897 of 2013), Supreme Court of Bangladesh.

⁷⁴ Zia Chowdhury, ‘A UNO’s Excess, Private Citizen’s Rights Violation and a District Court’s Bold Decision’ *The Business Standard* (Dhaka, 1 October 2021) <<https://www.tbsnews.net/bangladesh/court/jhenaidah-court-upholds-right-privacy-against-dsa-charges-310165>> accessed 14 November 2022; also, Nayan Khandokar, ‘Public Servants Cannot Violate Citizens’ Right to Privacy, Observes Jhenaidah Judge’ *Dhaka Tribune* (2 October 2021) <<https://archive.dhakatribune.com/bangladesh/2021/10/02/public-servants-cannot-violate-citizens-right-to-privacy-observes-jhenaidah-judge>> accessed 14 November 2022.

and rules of engagement of the Netizens in cyberspace.⁷⁵ This is how constitutional law has naturally been applied to develop general principles for cyberspace, which is seemingly in accord with ICCPR provisions.

However, in recent years, there has been a shift from the Berman approach of using constitutional law to adjudicate private actors in cyberspace to the Karavas approach of ‘constitutionalisation through the societal sub-sectors. The proposed Data Protection Act, 2022 of Bangladesh calls for the creation of a Data Protection Office that, among other things, ‘shall promote the protection and observance of the right to privacy and of data among its other functions’.⁷⁶ Section 9 of the proposed Act says that a data subject’s right to privacy shall not be violated by a data collector, data processor, or data controller when collecting, holding, or processing data. However, according to its section 35 ‘[d]ata protection office shall be under the direct control and administration of the Digital Security Agency established under the Digital Security Act, 2018’⁷⁷ and the Director General of the Digital Security Agency⁷⁸ shall be the head of the data protection office.

The draft Bangladesh Telecommunication Regulatory Commission Regulation for Digital, Social Media and OTT Platforms 2021⁷⁹ allows the Bangladesh Telecommunication Regulatory Commission (BTRC) to order individuals to take down content, empowers it to order social media companies to block content, and grants it indemnity for its actions under the law.⁸⁰ The Regulation imposes self-regulation on the Intermediaries.⁸¹ Also, in case of an emergency situation mentioned in article 141A of the Constitution of Bangladesh, BTRC can block information in cyberspace and the Director General of the Digital Security Agency can block public access to any information in cyberspace, and issue directives to identified and identifiable persons, publishers, intermediaries who are in control of hosting such

⁷⁵ Berman (n 53).

⁷⁶ Section 37 of the proposed Data Protection Act 2022 (ICT Division of the Bangladesh Government) <https://ictd.portal.gov.bd/sites/default/files/files/ictd.portal.gov.bd/page/6c9773a2_7556_4395_bbec_f132b9d819f0/Data%20Protection%20Bill%20en%20V13%20Unofficial%20Working%20Draft%2016.07.22.pdf> accessed 14 November 2022.

⁷⁷ *ibid*.

⁷⁸ *Laws of Bangladesh, Ministry of Law Justice and Parliamentary Affairs, Government of People’s Republic of Bangladesh* <<http://bdlaws.minlaw.gov.bd/act-1261.html>> accessed 14 November 2022.

⁷⁹ Bangladesh Telecommunication Regulatory Commission <<http://old.btrc.gov.bd/sites/default/files/u148664/The%20Bangladesh%20Telecommunication%20Regulatory%20Commission%20Regulation%20For%20Digital,%20Social%20Media%20And%20OTT%20Platforms%20%202,021.pdf>> accessed 14 November 2022.

⁸⁰ Ashutosh Sarkar and Zyma Islam, ‘BTRC Draft Rules on OTT: Govt given Indemnity for Its Actions’ *The Daily Star* <<https://www.thedailystar.net/news/bangladesh/news/btrc-draft-rules-ott-govt-given-indemnity-its-actions-3,147,256>> accessed 14 November 2022.

⁸¹ Article 2 (h) of the draft Regulation by BTRC defines ‘intermediaries’ as any person who on behalf of another person receives, stores, or transmits electronic records or provides any service with respect to such records and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online-market places, and cyber cafes.

information (BRTC article 11(1–2)). Here the application of Fitzgerald's mixed governance of cyberspace combining private sector's (intermediaries) self-regulation and public actors (BTRC) exercise of coercive power at the governance level is evident.

18.6 Conclusion

Along with the rapidly changing technological advances and creation of new forms of involvement in digital spaces, the concept of digital constitutionalism is still developing. The regulatory challenges of digital spaces, particularly in cyberspace, cannot always be resolved by the traditional governance process, which is applicable offline. Even long-established human rights principles and concepts, such as those found in UDHR or ICCPR that consider offline viewpoints, must be reinterpreted in this global, ethereal, non-territorial, and decentralised online digital realm of cyberspace. Along with the government or state authorities, private players can establish norms and standards of interaction in digital environments. For this reason, private actors have been acknowledged by Fitzgerald, Berman, Suzor, Karavas, Gill, Redeker, and Gasser as playing a part in the regulation of the digital domain. On the question of whether traditional constitutional norms should set up the discourse of private players in digital space or the other way around, or whether a mixed governance model should be pursued, these scholars are still at odds. The issue is more pressing when fundamental rights, such as the right to privacy, are in jeopardy in cyberspace because of the Big Data regime and it becomes necessary to rely on rights-based principles that are protected by constitutionalism in order to protect data subjects' rights.

That is why the government and non-government stakeholders should implement the inclusive, multistakeholder, effective, legitimate, and growing Internet governance framework to secure, promote, and preserve human rights in the digital sphere. The rights-based approach of digital constitutionalism can make the Internet transparent, protecting the right to privacy from the encroachment of a Big Data regime, as opposed to being controlled by governments or big tech corporations. A step on the right path toward a secure online environment against the useless collection of Big Data by intelligent machines with Artificial Intelligence capabilities may be the data subject's (individual) autonomy over their own personal data, preserved through a rights-based approach as the right does not come without struggle.

Therefore, this chapter has discussed that some constitutionally guaranteed rights could be applied to the context of digital space to protect the right to privacy in this Big Data regime. Contemporary notions of constitutionalism, including democratic values, human rights, and rule of law, can be applied to the digital environment to protect the right to privacy and other constitutionally guaranteed rights. This chapter holds that, in the digital world, a rights-based strategy can guarantee the best interests of all interested stakeholders, including the public, the government, and the IT sector. This is one method of defending the right to privacy via the lens of digital constitutionalism. In Bangladesh, where local laws and constitutional principles

have not yet defined digital rights properly, such a strategy is urgently needed. The method of digital constitutionalism can interpret already-existing constitutional principles and other municipal regulations to match the mixed governance context of the digital domain to protect people's right to privacy and related fundamental freedoms in Bangladesh.

References

Books

- Abelson, Hal, K. Ken Ledeen, and Harry Lewis. 2008. *Blown to Bits: Your Life, Liberty, and Happiness After the Digital Explosion*. Pearson, Upper Saddle River.
- András, Sajó, and Stephen Holmes. 1999. *Limiting Government: An Introduction to Constitutionalism*. Budapest: Central European University Press.
- Jasanoff, Sheila. 2016. *The Ethics of Invention: Technology and the Human Future*. New York: WW Norton & Company.
- Lessig, Lawrence. 2006. *Code and Other Laws of Cyberspace: Version 2.0*. New York: Basic Books.
- Solove, Daniel J. 2006. *Digital Person: Technology and Privacy in the Information Age*. New York\ London: New York University Press.

Chapters in Edited Books

- Gregorio, De Giovanni. 2022. Digital Constitutionalism, Privacy and Data Protection. In *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society*, 216. Cambridge University Press.
- Grimm, Dieter. 2010. The Achievement of Constitutionalism and Its Prospects in a Changed World. In *The Twilight of Constitutionalism?* ed. Petra Dobner and Martin Loughlin, 3–22. Oxford: OUP.
- Haque, Muhammad Ekramul. 2021. Constitutional Status of International Law in Bangladesh. In *Encyclopedia of Public International Law in Asia*, ed. Seokwoo Lee, 13–14. Brill/Nijhoff.
- Karavas, Vagias. 2010. Governance of Virtual Worlds and the Quest for a Digital Constitution. In *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries*, ed. Christoph B. Graber and Mira Burri-Nenova. Cheltenham\Northampton: Edward Elgar. ch 6.
- Teubner, Gunther. 2004. Societal Constitutionalism; Alternatives to State-Centred Constitutional Theory? In *Transnational Governance and Constitutionalism. International Studies in the Theory of Private Law*, ed. Christian Joerges, Inger-Johanne Sand, and Gunther Teubner. Oxford: Hart Publishing. sec I(1).

Articles

- Berman, Paul S. 2000. Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to 'Private' Regulation. *University of Colorado Law Review* 71: 1263.
- Celeste, Edoardo. 2019. Digital Constitutionalism: A New Systematic Theorisation. *International Review of Law, Computers & Technology* 33: 76.

- Fitzgerald, Brian. 1999. Software as Discourse? A Constitutionalism for Information Society. *Alternative Law Journal* 24: 144.
- Redeker, Dennis, et al. 2018. Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights. *International Communication Gazette* 80: 302.
- Solove, Daniel J. 2002. Conceptualizing Privacy. *California Law Review* 90: 1087.
- . 2013. Privacy Self-Management and the Consent Dilemma. *Harvard Law Review* 126: 1880.
- Warren, Samuel, and Louis Brandeis. 1890. The Right to Privacy. *Harvard Law Review* 4: 193.
- Westin, Alan F. 1968. Privacy and Freedom. *Washington and Lee Law Review* 25: 166.

Internet Sources

- 'Big Data: Seizing Opportunities, Preserving Values' (The White House, May 2014). https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf. Accessed 14 Nov 2022.
- Chowdhury, Zia. 2021. A UNO's Excess, Private Citizen's Rights Violation and a District Court's Bold Decision. *The Business Standard*, October 1. <https://www.tbsnews.net/bangladesh/court/jhenaidah-court-upholds-right-privacy-against-dsa-charges-310165>. Accessed Nov 14, 2022.
- Clarke, Roger. Information Technology and Dataveillance. (Roger Clarke's Website). <http://www.rogerclarke.com/DV/CACM88.html>. Accessed 14 Nov 2022.
- Floridi, Luciano and JW Sanders. 2021. On the Morality of Artificial Agents. SSRN, May 20. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3848388. Accessed 14 Nov 2022.
- Gantz, John and David Reinsel. 2011. Extracting Value from Chaos. *IDC iView*. <http://www.emc.com/collateral/analyst-reports/idc-extracting-value-from-chaos-ar.pdf>. Accessed 14 Nov 2022.
- Handbook on European data protection law*. 2018. (FRA: European Union Agency for Fundamental Rights). <https://fra.europa.eu/en/publication/2018/handbook-european-data-protection-law-2018-edition>. Accessed 14 Nov 2022.
- Hildebrandt, Mireille. 2013. Slaves to Big Data. Or Are We?. In *Selected Works of Mireille Hildebrandt*. https://works.bepress.com/mireille_hildebrandt/52/. Accessed 14 Nov 2022.
- Johnson, Bobbie. 2010. Privacy No Longer a Social Norm, Says Facebook Founder. *The Guardian*, January 11. <https://www.theguardian.com/technology/2010/jan/11/facebook-privacy>. Accessed 14 Nov 2022.
- Khandokar, Nayon. 2021. Public Servants Cannot Violate Citizens' Right to Privacy, Observes Jhenaidah Judge. *Dhaka Tribune*, October 2. <https://archive.dhakatribune.com/bangladesh/2021/10/02/public-servants-cannot-violate-citizens-right-to-privacy-observes-jhenaidah-judge>. Accessed 14 Nov 2022.
- King, Gary. Preface: Big Data Is Not about the Data! https://gking.harvard.edu/files/gking/files/prefaceorbigdataisnotaboutthedata_1.pdf. Accessed 14 Nov 2022.
- Manyika, James and others. 2011. Big Data: The Next Frontier for Innovation, Competition, and Productivity. McKinsey & Company. <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/big-data-the-next-frontier-for-innovation>. Accessed 14 Nov 2022.
- Naughton, John. 2016. Has the Internet Become a Failed State?. *The Guardian*, November 27. <https://www.theguardian.com/technology/2016/nov/27/has-internet-become-failed-state-crime-cyberspace>. Accessed 14 Nov 2022.
- Nissenbaum, Helen. 2004. Privacy as Contextual Integrity. *Washington Law Review* 79: 119.
- Sarkar, Ashutosh and Zyma Islam. BTRC Draft Rules on OTT: Govt given Indemnity for Its Actions. *The Daily Star*. <https://www.thedailystar.net/news/bangladesh/news/btrc-draft-rules-ott-govt-given-indemnity-its-actions-3147256>. Accessed 14 Nov 2022.
- Smith, Miss. 2015. 127 devices added to the Internet each second, but Congress is clueless about IoT, *CSO Online*. <https://www.csoonline.com/article/2942596/127-devices-added-to-the-internet-each-second-but-congress-is-clueless-about-iot.html>. Accessed 14 Nov 2022.

- The World's Most Valuable Resource is no Longer Oil, but Data. 2017. *The Economist*, London, May 6. <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>. Accessed 14 Nov 2022.
- Waldron, Jeremy. 2010. Constitutionalism: A Skeptical View (*Georgetown Law: The Scholarly Commons*, March 17). <https://scholarship.law.georgetown.edu/hartlecture/4/>. Accessed 14 Nov 2022.
- Woollaston, Victoria. 2013. Revealed, What Happens in Just ONE Minute on the Internet: 216,000 Photos posted, 278,000 Tweets and 1.8m Facebook likes. *MailOnline*. <http://www.dailymail.co.uk/sciencetech/article-2381188/Revealed-happens-just-ONE-minute-internet-216-000-photos-posted-278-000-Tweets-1-8m-Facebook-likes.html>. Accessed 14 Nov 2022.

Documents

- Fair Information Practice Principles. 1973. *The Federal Privacy Council of the US*. <https://www.fpc.gov/resources/fipps/>. Accessed 14 Nov 2022.
- OECD. 1980. Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. <https://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf>. Accessed 14 Nov 2022.
- Regulation (EU) 2016/679 of the European Parliament and of the Council 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), (2016) *Official Journal of the European Union*. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>. 10 July 2022.
- Special Rapporteur Frank La Rue report of the on the promotion and protection of the right to freedom of opinion and expression, UN Human Rights Council, UN Doc A/HRC/17/27 (2011). https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf. Accessed 14 Nov 2022.

Thesis

- Suzor, Nicolas Pierre. 2010. 'Digital Constitutionalism and the Role of the Rule of Law in the Governance of Virtual Communities' (PhD thesis, Queensland University of Technology, Australia). <https://eprints.qut.edu.au/37636/>. Accessed 14 Nov 2022.

Md Saimum Reza Talukder is Senior Lecturer at BRAC University School of Law (Bangladesh) and a member of the Artificial Intelligence Working Group of the Hannah Arendt Center for Politics and Humanities at Bard College, US. He participates in the Bangladesh Internet Freedom Initiative Working Group, a civil society initiative backed by regional and global non-governmental organisations. His area of interest includes legal facets of Big Data, AI, digital rights, and net neutrality. He has LLM and LLB from the University of Chittagong (Bangladesh), specialised Master's degree in Law and Digital Technologies from Leiden University, The Netherlands, and Postgraduate Diploma in Social Innovation in a Digital Context from Lund University, Sweden. He is a member of the Dhaka Bar Association and registered lawyer with the Bangladesh Bar Council.

Part IV

Constitutional Remedies

Chapter 19

Economic, Social and Cultural Rights: Transformation of Non-justiciable Constitutional Principles to Justiciable Rights in Bangladesh



Muhammad Ekramul Haque

Abstract The Constitution of Bangladesh has incorporated civil and political rights as judicially enforceable fundamental rights, while economic, social, and cultural (ESC) rights are incorporated as judicially unenforceable fundamental principles of state policy. Thus, the Constitution has bifurcated human rights into justiciable and non-justiciable groups reflecting the then international human rights law jurisprudence. Notably, the constitutional law of Bangladesh, in the last 50 years since its adoption, has witnessed a transformation of the non-justiciable constitutional principles on ESC rights into justiciable constitutional rights through judicial interpretations. The chapter explores how the judiciary in Bangladesh has extended the scope of judicial enforcement of constitutional principles on ESC rights despite having an express constitutional bar against justiciability of these principles.

Keywords Economic · Social and cultural rights · Constitutional principles · Non-justiciability · Right to life · Human rights · Judicial interpretation · Enforcement

M. E. Haque (✉)

Professor of Constitutional Law, Department of Law, University of Dhaka,
Dhaka, Bangladesh

e-mail: ekram.haque@du.ac.bd

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*,
https://doi.org/10.1007/978-981-99-2579-7_19

19.1 Introduction

The constitutional inclusion of economic, social, and cultural (ESC) rights has been a common phenomenon of modern constitutions.¹ The Constitution of Bangladesh has adopted the constitutional model of ESC rights as ‘non-justiciable principles’² which are often termed as ‘merely declaratory rights.’³ The inclusion of ESC rights as non-justiciable constitutional principles is a type of indirect protection of social rights in a constitution.⁴ The Constitution of Bangladesh has split human rights into two groups in a bifurcated manner based on their inherent nature as per international human rights law norm.⁵ Part II of the Constitution enumerates a set of ESC rights as the fundamental principles of state policy (FPSP),⁶ while Part III accommodates a bundle of civil and political rights (CP) as fundamental rights. Whilst CP rights are judicially enforceable owing to their characterisation as fundamental rights, their close partner in human rights, ESC rights, which are recognised as FPSP are not judicially enforceable. This judicially unenforceable nature of all FPSP is expressly

¹Malcolm Langford’s work shows that ‘overwhelming majority of constitutions in the world now contain at least one justiciable social right.’ See Malcolm Langford, ‘Judicial review in National Courts: Recognition and Responsiveness’ in Eibe Riedel et al. (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 417–47, 447.

²For a jurisprudential discussion on the idea of ‘justiciability’, see Robert S Summers, ‘Justiciability’ (1963) 26(5) *Modern Law Review* 530–538. See also, Edwin Borchard, ‘Justiciability’ (1936) 4(1) *The University of Chicago Law Review* 1–29; Peter Gordon Ingram, ‘Justiciability’ (1994) 35 *American Journal of Jurisprudence* 353–73. On the scope of justiciability, see Dominic McGoldrick, ‘The Boundaries of Justiciability’ (2010) 59(4) *International & Comparative Law Quarterly* 981–1019. On courts’ limited ability to protect constitutional rights, see Adam S Chilton & Mila Versteeg, ‘Courts’ Limited Ability to Protect Constitutional Rights’ (2018) 85(2) *The University of Chicago Law Review* 293–336.

³For a detailed discussion on this model see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 238–41.

⁴Jeff King, ‘Social Rights in Comparative Constitutional Theory’ in Gary Jacobsohn and Miguel Schor, *Comparative Constitutional Theory* (Edward Elgar Publishing 2018) 144–16, 159.

⁵For an account of development of constitutional rights in south Asia, see Jamal Green and Madhav Khosla, ‘Constitutional rights in South Asia: Introduction’ (2018) 16(2) *International Journal of Constitutional Law* 470–74. To get closer to an understanding of the legal implications of the notion of the indivisibility, interdependence, and interrelation of all human rights – economic, social, cultural rights and civil and political rights, see Ida Elisabeth Koch, ‘The Justiciability of Indivisible Rights’ (2003) 72 *Nordic Journal of International Law* 3–39.

⁶It has been noted that Part II provisions does not only include provisions relating to ESC Rights. It includes explanations of high ideals of the state and principles of the constitution, provisions relating to separation of power, duty of the citizens and public servants, directions on foreign policy etc. See Muhammad Ekramul Haque, ‘Does Part II of the Constitution of Bangladesh contain only economic and social rights?’ (2012) 23(1) *Dhaka University Law Journal* 45–50. However, scholars have pointed out that ‘most of the social and economic measures directed towards the establishment of socialism have found expression in Part II of the Constitution dealing with the FPSP’. See Abul Fazl Huq, ‘Constitution making in Bangladesh’ (1973) 46(1) *Pacific Affairs* 59, 73.

declared in article 8(2) of the Constitution. Albeit this declaration, the very same article mandated that all FPSP ‘shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens.’ Thus, it appears that the implementation of FPSP of the Constitution was a matter of ‘constitutional deferral’, which would be dependent on the steps to be taken by the state in the future.⁷

Despite the unequivocal declaration that ESC rights are judicially unenforceable, the Supreme Court of Bangladesh (SCB) has, in the last two decades, dealt with ESC rights in unique ways across multiple constitutional litigations. This chapter portrays how the SCB paved the way for the judicial enforcement of non-justiciable constitutional principles, essentially paving the way for the judicial enforcement of ESC rights, notably despite the unambiguous constitutional bar against their justiciability. In doing so, this chapter highlights three routes the SCB has explored to transform ESC rights into a justiciable right under the existing constitutional regime. The chapter concludes by showing that the path Bangladesh is pursuing towards the transformation of ESC rights into justiciable rights is consistent with Jeff King’s ground-breaking work⁸ on judging social rights by showing that Bangladesh is incrementally making social rights justiciable.

19.2 Judicial Enforcement of Non-justiciable Constitutional Principles

The bar against judicial enforcement of FPSP provisions, i.e., ESC rights, is explicit in article 8(2) of the Constitution. Despite such clear bar against judicial enforceability of FPSP, the SCB, over the years, has developed three different techniques for the enforcement of economic, social, and cultural rights recognised as FPSP which are as follows:

⁷For a discussion on ‘constitutional deferral’ see Rosalind Dixon, *Constitutional Design Deferred* in David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar Publishing 2019) 165–85; Rosalind Dixon and Tom Ginsburg, ‘Deciding Not to Decide: Deferral in Constitutional Design’ (2011) 9 *International Journal of Constitutional Law* 636; also Lael K Weis, ‘Constitutional Directive Principles’ (2017) 37 *Oxford Journal of Legal Studies* 916; Lael K Weis, ‘Constitutionally Obligatory Legislation: A Case Study in Legal Constitutionalism’ in Richard Albert and Joel Colón-Ríos (eds), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, and Applications* (Routledge 2019); Richard H Fallon Jr., *Implementing the Constitution* (Harvard University Press 2001).

⁸Jeff King, *Judging Social Rights* (CUP 2012). For an analytical commentary and focused discussion of its implication in Indian jurisdiction, see Farrah Ahmed and Tarunabh Khaitan, ‘Constitutional Avoidance in Social Rights Adjudication’ (2015) 35(3) *Oxford Journal of Legal Studies* 607–25.

- A. Negative enforcement of ESC rights under article 7(2) of the Constitution;
- B. Enforcement of ESC rights through the right to life; and
- C. Positive enforcement without explaining how the judiciary has overcome the constitutional hurdle of article 8(2) against justiciability.

19.2.1 Negative enforcement of ESC rights under article 7(2) of the Constitution

Article 7(2) of the Constitution upholds popular sovereignty, places the Constitution over any other laws of the land. It gives the SCB a mandate to nullify a law on the ground of inconsistency with the Constitution. Article 7(2) says:

This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

Yet article 8(2) declares the FPSP judicially unenforceable. What happens if a law is passed which is inconsistent with a FPSP? Can that law be declared void under article 7(2) or does article 8(2) act as a barrier against such declaration on the plea that such a declaration of nullity would amount to judicial enforcement of FPSP?

In 1992, the constitutionality of the Bangladesh Local Government (Upazila Parishad and Upazila Administration Re-organization) (Repeal) Ordinance 1991, which abolished Upazila Parishad, a local government institution, was challenged on the ground of its alleged inconsistencies with articles 9, 11, 59 and 60 of the Constitution.⁹ Articles 9 and 11 are FPSP provisions while articles 59 and 60 are not, and are therefore not subject to the bar in article 8(2).¹⁰ Ultimately the Upazila Parishad was determined not to be a local government, so no question of unconstitutionality arose. Nevertheless, some interesting obiter comments were delivered in this case.

The judgment delivered by Naimuddin Ahmed J in this case is the most elaborate judicial authority that speaks for judicial enforcement of the FPSP through the instrument of article 7(2). It was argued by the petitioners that the impugned ordinance was made in violation of article 11, an FPSP, so that law should be

⁹Ahsanullah, Pearlul Islam, Shamsul Karim, (1992) 44 DLR 179 ('Kudrat-E-Elahi Case').

¹⁰It is to be noted here that article 9 has been recently amended by the Constitution 15th Amendment in 2011. However, at the time of hearing of this case, article 9 was as follows: 'The State shall encourage local Government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given, as far as possible, to peasants, workers and women.' Article 11 contains provisions regarding democracy and human rights, which says: 'The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.' Articles 59 and 60 are not FPSP. They are incorporated in Part IV of the Constitution on 'The Executive', which contain provisions regarding local government. There is no question of judicial unenforceability of these latter two articles.

declared void under article 7(2) of the Constitution.¹¹ The Attorney General responded that even if the ordinance contravened an FPSP, it could not be declared void, as article 8(2) barred judicial enforceability of the FPSP.¹² Interestingly, Naimuddin Ahmed J investigated whether there was any conflict between articles 7(2) and 8(2), given the former indicates that breaches of the Constitution render laws and actions invalid, while the latter seems to prevent judicial findings of violation of certain constitutional provisions. He said that the ‘crux of the question is in interpreting the words, ‘shall not be judicially enforceable’ in article 8(2).¹³ To determine the possibility of judicial enforceability, he divided the probable scenarios into three distinct categories.¹⁴ In his words:

First, the Government may not implement the Fundamental Principles by legislative enactment or executive action.

Secondly, a legislative act or an executive action may not conform to the Fundamental Principles.

Lastly, there may be a legislative act or an executive action in clear violation of the Fundamental Principles.¹⁵

It appears that the first scenario deal with a positive breach of the FPSP, while the third one is about the negative breach. However, the second scenario has a closer resemblance to the third scenario, which seems to be referring to a potential negative breach of an FPSP. In the first two categories of circumstances (positive breach and potential negative breach), Naimuddin Ahmed J rejected any possibility of judicial enforcement.¹⁶ However, he positively affirmed judicial enforcement in the third situation where a legislative or executive act is made in violation of the FPSP. In his words:

... [A] legislative act which is in direct contravention of any provision of Part II of the Constitution calls for intervention by the Court and is liable to be struck down as void in spite of the provisions laid down in Article 8(2) of the Constitution that the provisions of Part-II of Constitution are not judicially enforceable. Clause 2 of Article 8 of the Constitution is not really in conflict with clause (2) of Article 7 of the Constitution.¹⁷

To reach to his conclusion he said that article 8(2) barred the judicial enforcement of the FPSP set out in Part II of the Constitution, but that ‘[did] not mean that since the Court cannot compel their enforcement, the executive and the legislature are at

¹¹ *Kudrat-E-Elahi Case*, (1992) 44 DLR 179, 187.

¹² *ibid.* 188.

¹³ *ibid.* 188–89.

¹⁴ *ibid.* 190.

¹⁵ *ibid.*

¹⁶ *ibid.* Naimuddin J observed: ‘In the first contingency the Court has no jurisdiction to direct the legislature to enact laws or the executive to act for implementing the Fundamental Principles and in the second contingency also the court cannot intervene and say that the legislative act or the executive action is invalid not being in conformity with the Fundamental Principles and also cannot issue directions to make them in conformity with those principles.’

¹⁷ *ibid.* 192.

liberty to flout or act in contravention of the provisions laid down in Part II of the Constitution'.¹⁸

On the fact of the case, if the ordinance had breached article 9, an FPSP, Naimuddin Ahmed J observed that that ordinance would have had to have been declared void under article 7(2) of the Constitution.¹⁹ He created a hypothesis: if the Upazila Parishad was found to be a local government institution within the meaning of article 9, the repealing ordinance would have been declared void under article 7(2) of the Constitution.²⁰ Thus, Naimuddin Ahmed J created room in obiter dicta for judicial enforcement of the FPSP in limited circumstances. The view expressed by Naimuddin Ahmed J supports the enforcement of negative breaches of FPSP in contrast to positive breaches. It is submitted that the enforcement of negative breaches of any ESC right should be the least controversial aspect of any enforcement of ESC rights. In fact, the enforcement of negative breaches is the least controversial aspect of enforcement of any human rights, CP, or ESC rights.

The learned counsels for the appellant raised, inter alia, a question on appeal before the Appellate Division of the Supreme Court (AD)²¹: though the FPSP were not judicially enforceable, what would happen if a law was found to be contradictory with the FPSP? They contended that the court in such a situation could declare that law void under article 7(2) of the Constitution. Finally, the AD did not settle the issue of enforceability of the FPSP as contended by the counsels, because no violation of the FPSP arose on the facts, so enforceability was ultimately not at issue. However, the judges gave obiter responses against the view expressed by Naimuddin Ahmed J in the High Court Division of the Supreme Court (HCD). Mustafa Kamal J denied that legislation passed in violation of the FPSP could be declared void under article 7(2) of the Constitution.²² Thus, it appears that Mustafa

¹⁸ *ibid.* 190–91.

¹⁹ *ibid.* 193. Naimuddin J observed: 'But, it appears to me that in the face of Article 9 of the Constitution it cannot vest the powers and functions of a Local Government institution, once it has been set up and started functioning, in the Government at the Centre, because, that would be against the express directive in Article 9 and if it is done it must be said that Parliament has acted contrary to and in contravention of Article 9 thereby attracting the mischief of Article 7(2) of the Constitution which declares any law inconsistent with any provision of the Constitution to be void'.

²⁰ *ibid.* 195 [83].

²¹ *Kudrat-E-Elahi Panir v Bangladesh* (1992) 44 DLR (AD) 319.

²² *ibid.* 346. He observed: 'Article 7(2) provides that this Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law, to the extent of the inconsistency, be void. Therefore, this constitution taken as a whole is a law, albeit the supreme law and by "any other law" and "that other law" the Constitution refers to the definition of "law" in Article 152(1), including a constitutional amendment. It is the Law of the Constitution itself that the *fundamental principles of state policy are not laws themselves but "principles"*. To equate "principles" with "laws" is to go against the Law of the Constitution itself. ... Article 8(2) proclaims the fundamental principles of state policy as "principles", not "laws" and that is the mandate of this Constitution. Article 7(2) cannot be interpreted to mean that if any other law is inconsistent with the "principles" mentioned in part II then that other law to the extent of the inconsistency, will be void. The Constitution is the supreme law and if the supreme law prescribes "principle" not "laws" and directs the use of these principles

Kamal J in the AD said that a law, which was found to be in conflict with a FPSP, could not be declared void under article 7(2) of the Constitution. In substantiating his opinion, he made a distinction between the terms ‘this Constitution’ and ‘provisions of the Constitution’. Article 7(2) said that a law which is inconsistent with ‘this Constitution’ could be declared void. The term ‘this Constitution’, in Mustafa Kamal J’s opinion, included only the ‘laws’ of the Constitution, which did not include the FPSP as they were ‘principles’ rather than laws. According to his opinion, the term ‘provisions of the Constitution’, which is not used in article 7(2), includes every provision of the Constitution including the constitutional principles.

It is submitted that there is no legal or logical basis for this superficial distinction. The term ‘this Constitution’ textually includes all provisions of the Constitution, whether ‘law’ or ‘principle’. There is no apparent reason to exclude constitutional principles from the scope of the constitution. Indeed, in *Masdar Hossain vs Bangladesh*,²³ Md. Mozammel Hoque J categorically pointed out that the FPSP ‘are [an] integral part of the supreme law of the land i.e., the Constitution.’²⁴ Indeed, there is no real basis for excluding FPSP from the operation of article 7(2) of the Constitution by resort to article 8(2). Article 7(2) takes away the power to make legislation which conflicts with the Constitution, while article 8(2) imposes restrictions on the judiciary in enforcing certain FPSP. Neither article 7(2) nor article 8(2) includes any exclusion clause regarding the non-applicability of article 7(2) in case of any legislation passed in conflict with FPSP.

Naimuddin Ahmed J was the first judge to propose a new type of judicial enforcement of the FPSP under article 7(2) in limited circumstances. He observed that article 8(2) did not bar every type of judicial interference with FPSP. He argued that the enforcement of obligations of the state to implement the FPSP was barred by article 8(2). But if the state passed a law which directly contravened the FPSP, that law could be declared void by the court under article 7(2) despite article 8(2). The barring of such judicial enforcement was not mandated by article 8(2). It is true that the AD criticised his view on the ground of dealing with a question unwarranted by the fact of the case. The AD, however, did not examine the academic merit of his view, and is itself open to considerable criticism.

Kudrat-E-Elahi case has generally been seen as a case where Naimuddin Ahmed J in the HCD argued in favour of a limited enforceability of the FPSP, while the AD completely denied their judicial enforceability. It is submitted that Naimuddin Ahmed J paved the way for limited judicial enforcement of the ESC rights recognised

in certain specific manner, then the other law cannot be made void on the ground of inconsistency with these principles. It is argued that article 9 and 11 are provisions of the Constitution and if any other law is inconsistent with these provisions, then it will be void. Article 7(2) says “this Constitution”, not “provisions of the Constitution”, which expression the Constitution uses in some other places. The use of the words “this Constitution” and not “provisions of the Constitution” is also deliberate. [emphasis added].

²³ (1998) 18 BLD (HCD) 558.

²⁴ *ibid.* 576.

as FPSP. If Parliament makes a law in direct violation of an FPSP, that law should be declared void by the Court under article 7(2) of the Constitution.

19.2.2 Enforcement of ESC Rights Through the Right to Life

The fundamental right to life is incorporated in articles 31 and 32 of the Constitution. Article 32 states that '[n]o person shall be deprived of life or personal liberty save in accordance with law.' In enumerating the right to protection of law, article 31 lays down certain provisions regarding the right to life: 'in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.' Neither of these two articles contains any concrete definition of the right to life. Furthermore, they merely declare the right to be protected against deprivation of life: they do not explicitly provide for a positive right to life. However, the SCB has adopted a progressive interpretation of the right to life by linking it with certain basic ESC human rights. It appears that the implementation of these other rights, such as the rights to food, shelter, clothing, health, and medical care, is a prerequisite for the proper enjoyment of the right to life. These other rights are recognised by the Constitution as FPSP, which have been declared as judicially unenforceable. Nevertheless, the Court in some cases has allied the right to life, an important fundamental right, with such ESC rights.

The Court adopted an extended meaning of the right to life for the first time in 1996 in *Dr. Mohiuddin Farooque v Bangladesh* ('Contaminated Milk Case'),²⁵ where the provision regarding protection of health contained in article 18(1) was considered as a part of the right to life. This writ petition was filed against the marketing of imported contaminated condensed milk. The Court issued some directions to prevent the release of such contaminated milk from the port and its marketing in the country. With reference to a series of Indian cases, the Court concluded, regarding the scope of the right to life, that:

[I]t appears that right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of workers, their means of livelihood, enjoyment of pollution-free water and air, bare necessities of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity.²⁶

The petitioner contended that the action of the government authority concerned, which did not compel the importer to return the said milk, threatened the life of the people and violated the fundamental right to life.²⁷ The Court set a question to determine—

²⁵ (1996) 48 DLR 438.

²⁶ *ibid.* 442 [17].

²⁷ *ibid.* 440.

[W]hether alleged contaminated imported milk powder endangers or may endanger life of the petitioner and other people living in the country violating the fundamental right to life. If right to life under Articles 31 and 32 of the Constitution means right to protection of health and normal longevity of an ordinary human being endangered by the use or possibility of use of any contaminated foods, etc. then it can be said that fundamental right of right to life of a person has been threatened or endangered.²⁸

The Court examined the adverse effect of contaminated food on human health and its resultant impact on the right to life. The contaminated milk was considered injurious to health, so its marketing would go against the mandate of article 18(1), an FPSP which directs the state to improve public health. The Court, citing article 18(1), said:

Though the aforesaid provision [article 18(1) of the Constitution] cannot be enforced by the Court it can be seen for interpreting the meaning of right to life under Articles 31 and 32 of the Constitution. A man has natural right to the enjoyment of healthy life and a longevity up to normal expectation of life of an ordinary human being. Enjoyment of a healthy life and normal expectation of longevity is threatened by disease, natural calamities and human actions. When a person is grievously hurt or injured by another his life and longevity are threatened. Similarly, when a man consumes food, drink, etc. injurious to health, he suffers ailments and his life and normal expectation of longevity are threatened. Natural right of a man to live free from all the man made hazards of life has been guaranteed under the aforesaid Article 31 and 32 subject to law of the land. Use of contaminated food, drink, etc. be imported or locally produced undoubtedly affects health and threatens life and longevity of the people.²⁹

The Court then adopted an extended meaning of the right to life, which included, in particular, ‘protection of health and normal longevity of an ordinary human being’ within the meaning of the right to life enshrined in articles 31 and 32 of the Constitution.³⁰ The Court clarified that though the state’s duty to protect the health of the people under article 18(1) could not be enforced, the state was obliged to protect health as a part of the constitutionally guaranteed right to life under articles 31 and 32.³¹

Thus, while the duty of the state contained in article 18(1) could not be enforced directly due to the bar of article 8(2), the Court enforced article 18(1) through the

²⁸ *ibid.* 442 [18].

²⁹ *ibid.*

³⁰ *ibid.* The Court observed: ‘We are, therefore, of the view that the right to life under Articles 31 and 32 of the Constitution not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, protection of health and normal longevity of an ordinary human being.’

³¹ *ibid.* The Court observed: ‘It is the primary obligation of the State to raise the level of nutrition and the improvement of public health by preventing use of contaminated food, drink, etc. Though that obligation under Article 18(1) of the Constitution cannot be enforced State is bound to protect the health and longevity of the people living in the country as right to life guaranteed under Article 31 and 32 of the Constitution includes protection of health and normal longevity free from threats of man-made hazards unless the threat is justified by law. Right to life under the aforesaid Articles of the Constitution being a fundamental right it can be enforced by this Court to remove any unjustified threat to the health and longevity of the people as the same are included in the right to life.’

enforcement of articles 31 and 32 (two fundamental rights) by adopting an extended meaning of the right to life. The Court interpreted articles 31 and 32 in the light of article 18(1).

The SCB has consistently adopted an extended meaning of the right to life, where the Court has enforced the mandates of different FPSP linking them to the right to life, a fundamental right guaranteed by the Constitution.³² In no case, so far, has the Court refused to adopt such a creative interpretation of the right to life. This approach is comparable to the approach taken by the Indian Courts in many cases. The SCB, in the *Contaminated Milk case*, has in fact relied on different Indian cases³³ including an American case³⁴ on this point and as such it is submitted that the Indian idea³⁵ of enforcement of ESC rights through adopting an extended meaning of the right to life has been transplanted in Bangladesh. This model of enforcement of ESC rights through judicial interpretation of civil and political rights has been adopted in many other jurisdictions.³⁶ Such judicial approach shows that ‘ESC and CP rights intersect not only at the normative level, on the basis of the interdependence principle but also, and more importantly, in practice.’³⁷ The Court has adopted this

³² *Professor Nurul Islam v Bangladesh* (2000) 52 DLR 413; *Dr. Mohiuddin Farooque, Secretary General, Bangladesh Environmental Lawyers Association (BELA) being dead Ms Syeda Rizwana Hasan, director (programme), representing BELA v Bangladesh* (2003) 55 DLR 69; *Dr. Mohiuddin Farooque v Bangladesh* (1998) 3 MLR (HC) 33; *Ain O Salish Kendra (ASK) v Bangladesh* (1999) 19 BLD 488; *BESHR v Bangladesh* (2001) 53 DLR 1; *BLAST v Bangladesh* (2008) 60 DLR 749, 755 [21]; *Dr. Mohiuddin Farooque v Bangladesh* (1997) 49 DLR (AD) 1.

³³ *Francis Coralie vs Union Territory of Delhi*, A.I.R. 1981 S.C. 746, *Bandhua Mukti Morcha vs Union of India*, A.I.R. 1984 S.C. 803, *Olga Tellis vs Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180, *Vincent vs Union of India*, A.I.R. 1987 S.C. 990, *Vikram Deo Singh vs State of Bihar*, A.I.R. 1988 S.C., *Subash Kumar vs State of Bihar*, A.I.R. 1991 S.C. 420.

³⁴ The Court said: ‘The Fifth Amendment to the Constitution of the United States of America declares: “No person shall be deprived of his life, liberty or property without due process of law”’. The Fourteenth Amendment also imposes a similar limitation on the states. In the case of *Munn vs Illinois* (1877) 94 U.S. 113, in his dissenting judgment Field J interpreted ‘life’ under the aforesaid provisions of the US Constitution as follows: ‘Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.’ *Dr. Mohiuddin Farooque v Bangladesh* (‘Contaminated Milk Case’) (1996) 48 DLR 438.

³⁵ In India, the constitutional right to life guaranteed by article 21 as a fundamental right ‘has been interpreted broadly to encompass many of the expressly non-justiciable Directive Principles of State Policy’. Sujit Choudhry, ‘Postcolonial Proportionality Johar, Transformative Constitutionalism, and Same- Sex Rights in India’ in Philipp Dann, Michael Reigner and Maxim Bonnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020) 191. For a details on this Indian approach see Dennis M Davis, ‘Socio-economic rights: has the promise of eradicating the divide between first and second generation rights been fulfilled?’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 519–32, 525–27.

³⁶ Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020) 139.

³⁷ Ioana Cismas, ‘The Intersection of Economic, Social and Cultural Rights and Civil and Political Rights’ in Eibe Riedel et al. (eds), *International Law: Contemporary Issues and Challenges* (OUP 2014) 448–72, 448.

coordinated approach in a recent case³⁸ where the court said that to get medical care is the fundamental right of every citizen under article 32 (right to life) of the constitution.

However, in the 2009 case of *Advocate Zulhas Uddin v Bangladesh*,³⁹ the Court, remarkably, enforced article 18⁴⁰ along with the right to life under article 32. The petitioner filed the writ petition challenging the provision of the Value Added Tax (VAT) Act 1991 which excluded medical clinics, dental clinics, and pathological laboratories from the exemption of paying VAT. It was argued that due to the said exclusion, medical patients had to bear the additional expenses of paying the VAT, which eventually obstructed their right to health and as such their right to life. The petitioner claimed it as violations of both the FPSP contained in article 18 and the fundamental right contained in article 32. The petitioner argued:

That it is submitted that as per Article 18 of the Constitution of Bangladesh ‘the state shall improve public health as among its primary duty’ and it is the Fundamental Principle of State Policy. But instead of that, obstruction has been created by way of imposing VAT in case of health treatment, hence it is illegal and liable to be declared illegal.⁴¹

The Court observed that the right to life contained in article 32 and the principle contained in article 18 were not empty words, rather they were constitutional directions. The Court added that the government could not ignore either of the two, and that no law could be made against either the fundamental right or FPSP. The Court said that the imposition of the above tax was a violation of the spirit of articles 32 and 18 of the Constitution so it was illegal. Though the Court identified the said law as a violation of the fundamental right to life contained in article 32, it did not solely rely on that article. The Court also declared the illegality of the law based on both articles. Thus, article 18, an FPSP, was enforced in this case alongside article 32. The Court did not enforce article 18 through article 32 by incorporating the mandate of article 18 within the fold of article 32. Rather, the Court seemed to enforce each of articles 32 and 18 independently.

To reach its final decision, the Court clearly observed that any law passed against the FPSP would be illegal. The Court effectively endorsed Naimuddin Ahmed J’s view expressed in *Kudrat-E-Elahi Case*, though not explicitly. The most significant aspect of this case is that the above observation of the Court was not a mere judicial observation or obiter dicta, rather it was the *ratio decidendi* of the decision.

³⁸ *National Medical Association of Bangladesh vs. Bangladesh and Others* HCD 535 of 2019(19 November 2020).

³⁹ 15 MLR (HCD) 2010, 433 (‘Zulhas Uddin’).

⁴⁰ Article 18 states: ‘(1) The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and drugs which are injurious to health.

(2) The State shall adopt effective measures to prevent prostitution and gambling’.

⁴¹ *ibid.* petition (The original petition submitted by the petitioner in the above case) [14] (Copy on file with the author).

Remarkably, no opposition was raised from the respondents regarding enforcement of article 18. Even the Court did not say anything about article 8(2) and the judicially unenforceable nature of the FPSP. Rather, the Court clearly said that no law could be passed in violation of any FPSP and found a law that was made in violation of article 18, an FPSP, to be void. This is a milestone case of direct enforcement of a FPSP which contains state obligation regarding health, a right of ESC nature.

Later, the AD rejected the petition for leave to appeal⁴² by the government, so the above judgment given by the HCD stands.⁴³ In the petition for the leave to appeal, the learned counsel for the government did not raise any question against judicial enforceability of article 18. Indeed, he admitted that article 18 did not support the imposition of such a tax on the health sector.⁴⁴ He however added that

Bangladesh is admittedly a less developed country in the world and so in consideration of the level of the economic development of the state, imposition of VAT is very much appropriate and not in violation of fundamental principle of state policy of this Constitution.⁴⁵

Surprisingly, the AD also said nothing about the bar in article 8(2). In dismissing the petition, as no substance was found in the petition of the government,⁴⁶ the Court merely said:

Modern Bangladesh being a democratic country though its resources are limited, but it has the good intention to provide minimum health care/medical services facilities to its citizens in spite of its financial handicap but under the impugned imposition of VAT it requires citizens to pay fees for the [medical clinics, dental clinics and pathological laboratory]. Thus, interfering in providing the general public of its minimum health care and as such, any imposition of extra-tax in the name of VAT is contrary to the spirit and principle of Articles 18 and 32 of the Constitution and as such, the same is liable to be struck down as contrary to the Constitution providing guarantee of public health to the citizens.⁴⁷

19.2.3 Positive enforcement of the FPSP under article 7(2).

*Major General K. M. Safiullah v Bangladesh*⁴⁸ is another recent case where article 24, an FPSP which arguably reflects some of the provisions in article 15(2) of the ICESCR, was clearly enforced. One distinctive feature of this case was that the Court did not relate the enforcement of article 24 to any other provision of the Constitution for its enforcement. Article 24 of the Constitution declares that '[t]he

⁴²To file an appeal to the AD against a decision of the HCD, the appellant, in some cases, first require making a petition for leave to appeal. The appeal could be lodged if the petition for leave to appeal is granted.

⁴³*Bangladesh v Advocate Zulhas Uddin* [2010] 39 CLC (AD).

⁴⁴*ibid.* [3].

⁴⁵*ibid.*

⁴⁶*ibid.* [7].

⁴⁷*ibid.* [6].

⁴⁸[2009] HCD 4313 of 2009 (08 July 2009).

State shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historic importance or interest.’ The writ petition was filed to direct the government to take necessary steps, as constitutional obligations under article 24, to protect and maintain various memorable places of the liberation war. The Court accepted the arguments of the petitioner and ordered the government to take steps to protect the historically important places. Although the Court did not clarify how it overcame the hurdle of article 8(2), it added that the Court has the authority to compel the state to uphold an FPSP in case of a negative breach of an FPSP:

It is true that the FPSP shall be fundamental in the governance of the country, but they are not judicially enforceable. However, the state cannot take any step which goes against any FPSP in part II of the Constitution. If the state takes any such step, then the Court has the authority to compel the state to uphold the FPSP.⁴⁹

The Court added that the petitioners had argued in the case that the historical places had been disfigured by erecting different establishments. The Court consequently issued mandatory directions to the government to remove all illegal establishments and to take other positive steps to preserve those places.⁵⁰ Thus, it appears that the Court enforced article 24, an FPSP, both negatively and positively.

This case goes beyond the progressive view of Naimuddin Ahmed J expressed in *Kudrat-E-Elahi Case*,⁵¹ as it is enforcing a positive obligation imposed by an FPSP. However, the Court in this case did not substantiate how it overcame the bar against judicial enforceability contained in article 8(2). If it is found that the government has been consistently negligent in implementing a particular duty imposed by an FPSP, perhaps this case indicates that the Court can then issue directions to the government to fulfil its constitutional obligations. Nevertheless, in enforcing an FPSP in such a way, it is unfortunate that the Court failed to clearly specify the basis upon which it overcame the bar of article 8(2).

19.3 Conclusion

It appears from the above discussion that the SCB has judicially enforced ESC rights despite their recognition as non-justiciable FPSP. The court has achieved it through three different approaches: negative enforcement of FPSP under article 7(2), indirect enforcement using a coordinated approach through judicially guaranteed right to life, and positive enforcement without unequivocal justification as to how the court overcame the barrier under article 8(2). The eventual impact of these ventures is that the judiciary has created a scope for the judicial enforcement of non-justiciable constitutional provisions regarding ESC rights in appropriate

⁴⁹ *ibid.* 337 (Translation into English is of mine).

⁵⁰ *ibid.*

⁵¹ (1992) 44 DLR 179.

cases. As a result, the gap between CP rights and ESC rights is diminishing under the constitutional regime of Bangladesh as has been envisioned⁵² in the modern literature on international human rights law.

References

Books

- Boyle, Katie. 2020. *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication*, 139. Oxford: Routledge.
- Fallon, Richard H., Jr. 2001. *Implementing the Constitution*. Cambridge: Harvard University Press.
- King, Jeff. 2012. *Judging Social Rights*. Cambridge: Cambridge University Press.
- Tushnet, Mark, Weak Courts, and Strong Rights. 2008. *Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, 238–241. Princeton: Princeton University Press.

Chapters in Edited Books

- Choudhry, Sujit. 2020. Postcolonial Proportionality Johar, Transformative Constitutionalism, and Same- Sex Rights in India. In *The Global South and Comparative Constitutional Law*, ed. Philipp Dann, Michael Reigner, and Maxim Bonnemann, 191. Oxford: OUP.
- Cismas, Ioana. 2014. The Intersection of Economic, Social and Cultural Rights and Civil and Political Rights. In *International Law: Contemporary Issues and Challenges*, ed. Eibe Riedel et al., 448–472. Oxford: OUP.
- Davis, Dennis M. 2011. Socio-economic rights: has the promise of eradicating the divide between first and second generation rights been fulfilled? In *Comparative Constitutional Law*, ed. Tom Ginsburg and Rosalind Dixon, 519–532. Cheltenham: Edward Elgar.
- Dixon, Rosalind. 2019. Constitutional Design Deferred. In *Comparative Constitution Making*, ed. David Landau and Hanna Lerner, 165–185. Cheltenham: Edward Elgar Publishing.
- King, Jeff. 2018. Social Rights in Comparative Constitutional Theory. In *Comparative Constitutional Theory*, ed. Gary Jacobsohn and Miguel Schor, 144–159. Cheltenham: Edward Elgar Publishing.
- Langford, Malcolm. 2014. Judicial review in National Courts: Recognition and Responsiveness. In *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, ed. Eibe Riedel et al., 417–447. Oxford: OUP.

⁵² See for details, Louis Edgar Esparza, ‘Ensuring Economic and Social Rights’ in Judith Blau & Mark Frezzo (eds), *Sociology and Human Rights: A Bill of Rights for the Twenty-First Century* (Sage 2017) 35–56.

Articles

- Ahmed, Farrah, and Tarunabh Khaitan. 2015. Constitutional Avoidance in Social Rights Adjudication. *Oxford Journal of Legal Studies* 35 (3): 607–625.
- Borchard, Edwin. 1936. Justiciability. *The University of Chicago Law Review* 4 (1): 1–29.
- Chilton, Adam S., and Mila Versteeg. 2018. ‘Courts’ Limited Ability to Protect Constitutional Rights. *The University of Chicago Law Review* 85 (2): 293–336.
- Dixon, Rosalind, and Tom Ginsburg. 2011. Deciding Not to Decide: Deferral in Constitutional Design. *International Journal of Constitutional Law* 9: 636.
- Green, Jamal, and Madhav Khosla. 2018. Constitutional rights in South Asia: Introduction. *International Journal of Constitutional Law* 16 (2): 470–474.
- Haque, Muhammad Ekramul. 2012. Does Part II of the Constitution of Bangladesh Contain only Economic and Social Rights? *Dhaka University Law Journal* 23 (1): 45–50.
- Huq, Abul Fazl. 1973. Constitution making in Bangladesh. *Pacific Affairs* 46 (1): 59–73.
- Ingram, Peter Gordon. 1994. Justiciability. *American Journal of Jurisprudence* 35: 353–373.
- Koch, Ida Elisabeth. 2003. The Justiciability of Indivisible Rights. *Nordic Journal of International Law* 72: 3–39.
- McGoldrick, Dominic. 2010. The Boundaries of Justiciability. *International & Comparative Law Quarterly* 59 (4): 981–1019.
- Summers, Robert S. 1963. Justiciability. *Modern Law Review* 26 (5): 530–538.
- Weis, Lael K. 2017. Constitutional Directive Principles. *Oxford Journal of Legal Studies* 37: 916.

Muhammad Ekramul Haque PhD is a Professor of Comparative Constitutional Law at the University of Dhaka, obtained his PhD in Constitutional Law and International Law from Monash University, Australia, and a leading scholar in constitutional law and comparative constitutional law in Bangladesh. His research on constitutional law focuses on how comparative constitutional experience and international law reflect and help shape the understanding and development of the Bangladesh Constitution and its interpretations. He is the State Volume Editor of Bangladesh in Encyclopedia of Public International Law in Asia (Brill/Nijhoff, 2021), Section Editor of International Law in the International Handbook of Disaster Research (Amita Singh ed., Springer-Nature), a Rapporteur in Asian Yearbook of International Law (Brill), serves on the Governing Body of Development of International Law in Asia, and a member of the Research Group on ‘Cross-Judicial Fertilization: The Use of Foreign Precedents by Constitutional Judges’, International Association of Constitutional Law and the International Society of Public Law ICON•S. He is co-editor of a forthcoming book titled: Implementation of Sustainable Development in the Global South: Strategies, Innovations and Challenges (HART Publishing).

Chapter 20

The Writ Jurisdiction in Bangladesh: In Search of a Consistent Procedural Framework



Md Abdul Halim

Abstract The writ jurisdiction entrenched in the Constitution provides for the power of judicial review of administrative, legislative, quasi-judicial and in some cases judicial actions and inactions as a part of constitutionalism. It also provides further power to enforce some fundamental rights to the citizens and non-citizens of the country. Although article 102 does not contain the names of various writs in specific, when exercising the power of judicial review or interpreting procedure of writ powers the Supreme Court has, directly or indirectly, adhered to some strategic methods and procedure by which it has either extended their power or in some cases limited. Given that the provisions in article 102 are indeterminate, the judges are reposed with a duty to read specific meanings into them and determine their scope and extent. Further to this, along the line of interpretation, the apex court has also developed some rules and procedures to operate writ jurisdiction. It is within this context that the Supreme Court has leveraged to engage in judicial activism or inactivism. This chapter analyses the ‘form’ of public law, ie, the procedure by which the Supreme Court has, since 1972, exercised the power of writ jurisdiction. It critically reviews some aspects of the ‘form’ or procedure of writ jurisdiction under article 102 of the Constitution. In particular, the chapter argues that the ‘form’ and procedure in respect of the adjudication of writ jurisdiction adopted by the Supreme Court in enforcing judicial review have not arguably been coherent in line with the constitutionalism.

Keywords Writ jurisdiction · Judicial review · Supreme court · Fundamental rights · Judicial activism-inactivism · Public law and procedure · Irregular writ · Natural justice

Md A. Halim (✉)
Supreme Court of Bangladesh, Dhaka, Bangladesh
e-mail: halim_md@yahoo.co.uk

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*,
https://doi.org/10.1007/978-981-99-2579-7_20

20.1 Introduction

‘Form’ says Rudolf von Jhering, ‘is the twin sister of liberty, and the sworn enemy of the arbitrary’.¹ By using the term ‘form’ scholars of public law mean ‘procedure or process’ of adjudication. The procedure of adjudication of constitutional disputes under writ jurisdiction is as important as its substantive disposal of various writ petitions. Procedural norms are those in the process of adjudication which are formal and tightly structured procedurally in order to enable an impartial body to determine the rights and responsibilities of particular persons fairly and effectively after hearing evidence and argument from both sides.² Procedure on adjudication is often coined with instrumentalist approaches by researchers.³ Though it is sometimes difficult to formulate any test which will distinguish between procedural and substantive law, substantive law remains the ‘law’ which the court enforces and procedure is the practical rules by which the court enforces it.⁴ It is often argued that there is an intrinsic connection between process and substance because they are two integral aspects of the public law rather than distinct phenomena.⁵

Every substantive law has its procedure and the law on judicial review or writ jurisdiction is no exception to this. It has been argued that process and substance are two aspects of the public law form and that the form conditions the content of the law.⁶ The more significant the substantive issues are, the greater the importance of the procedure will be. For instance, on the issue of the principle of fairness, it is an established rule that the procedures must be fair, ie, it must treat the parties equally.⁷ Fairness here essentially means equality of treatment not only in the substance of the laws but also in the procedure of enforcing the law. Golding argues that there are some principles which help spell out fairness: (i) the dispute settler should be neutral and a judge should not be biased; (ii) at the hearing, the information of both sides should be presented; and (iii) each party should, at least, be aware of the information presented by the other and have an opportunity to respond to it.⁸ This principle of

¹Rudolf von Jhering, quoted by RS Summers, *Form and Function in a Legal System: A General Study* (Cambridge Google Scholars 2006) 123.

²J Waldron, *The Rule of Law and the Importance of Procedure* (Am Soc Pol Legal Phil, NOMOS, 2011) 15.

³Michael Bayles, ‘Principles for Legal Procedure’ (1986) 5(1) *Journal of Law and Philosophy* 33–57; also, Summers (n 1) 145; Jeremy Waldron, ‘The Rule of Law in Contemporary Liberal Theory’ (1989) 2 *Ratio Juris* 79. For a discussion of substantive rule of law ideas, see Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ in Denise Meyerson (ed), *The Rule of Law and the Separation of Power* (Routledge, London 2005) 21.

⁴Thurman Arnold, ‘The Role of Substantive Law and Procedure in the Legal Process’ (1932) 45(4) *Harvard Law Review* 617–647.

⁵D Dyzenhaus, ‘Process and Substance as Aspects of the Public Law Form’ (2015) 74(2) *The Cambridge Law Journal* 285.

⁶*ibid.* 285.

⁷Ronald Dworkin, ‘Principle, Policy, Procedure’ in CFH Tapper (ed), *Crime, Proof and Punishment* (Butterworths, London 1981) 193–225.

⁸MP Golding, ‘My Philosophy of Law’ in LJ Wintgens (ed), *The Law in Philosophical Perspectives* (Law & Philosophy Library vol 41, Springer, Dordrecht 1999) 122–23.

fairness in the procedure further specifies that the parties are on an equal footing providing a realistic reason for significant participation in the public law adjudication.⁹ Fuller argues that the violation of any of these will fall under the domain of 'procedural due process'.¹⁰ For the sake of rule of law and constitutionalism through constitutional adjudication, it is often contended that the justification of a legal system and procedures must be one of lesser evils, that legal resolution of disputes is preferable to blood feuds, rampant crime and violence.¹¹

Seen in the light of the above conceptualisation and importance of procedural aspect of a legal jurisdiction, this chapter offers a critical study of some aspects of the procedure of writ jurisdiction of the Supreme Court. Article 102 of the Constitution gives the substantive power of writ jurisdiction, and the procedural powers are derived from two important sources: the Rules of the Supreme Court and some customary procedure developed by courts over the years in adjudicating constitutional disputes. However, the available legal literature has failed to address the effectiveness of procedural jurisprudence of public law in Bangladesh. It is against this background that this chapter tries to fill the gap by examining some aspects of procedure in dispensation of constitutional adjudication. While examining these issues, this chapter argues that the strategies and procedure in respect of some fundamental aspects of writ jurisdiction adopted by the High Court Division (HCD) in enforcing judicial review have not been coherent in line with the constitutionalism and most importantly the procedural law has often undermined the adjudication of substantive remedies under public law.¹² Before I enter into the discussion on the procedure of writ jurisdiction, it is convenient to highlight an introduction of writ and judicial review within the framework of the constitution.

20.2 Writ Jurisdiction and Judicial Review

In common parlance, the term 'writ' means a form of written command or order issued by a competent court to act or abstain from acting in a particular way. Initially in England writs were royal prerogatives. 'They were called prerogative writs because they were conceived as being intimately connected with the rights of the crown'.¹³ The king issued five types of writs¹⁴ through the court of Kings' Bench or the Court

⁹ *ibid.* 123.

¹⁰ Lon L Fuller, *Morality of Law* (Yale University Press, New Haven, 1969) 81. In the UK and other jurisdiction, the term 'natural justice' is used to refer to the most elementary aspects of what Americans would call 'procedural due process', see Paul Jackson, *Natural Justice* (Sweet and Maxwell, London, 1979).

¹¹ Lon L Fuller, 'The Forms and Limits of Adjudication' in KI Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (OUP 2001) 111; also, Bayles (n 3) 33–57.

¹² On framing such arguments, see MA Halim, *Practice and Procedure in the Supreme Court* (2 vols, CCB Foundation, Dhaka 2018) 13–176.

¹³ D Smith, *Judicial Review of Administrative Action* (Stevens and Sons, London 1959) 167.

¹⁴ Habeas Corpus, Certiorari, Prohibition, Mandamus, and Quo-Warranto.

of Chancery. Gradually as the governmental functions increased and the concept of rule of law emerged and the courts became independent, these writs came to be the prerogatives of courts instead of the King and lastly they came to be the prerogatives of the people, for they are now guaranteed rights in the constitutions of many countries and citizens can invoke them as of right.¹⁵ It was the birth of the commonwealth which acted as the flood gate for global acceptance of writ jurisdiction as a constitutional instrument of rule of law against administrative excesses by governments.¹⁶

Most of the Constitutions of the commonwealth countries have adopted the English traditional provisions of five types of writs as a safeguard to rule of law. In other words, the main purpose of writ jurisdiction is to ensure that all constitutional and administrative actions and inactions are confined to the limits of the law and the Constitution. Thus, the writ jurisdictions act as judicial restraints of policy decisions which are unreasonable, unfair and against public interest.¹⁷ Having said this, it would be relevant to discuss, in short, the constitutional basis and arrangement of writ jurisdiction of the Supreme Court of Bangladesh.

20.3 Constitutional Framework of Writ Jurisdiction of the Supreme Court of Bangladesh

The founding Constitution of Bangladesh was adopted 1972 and two of its foremost basic features are 'supremacy'¹⁸ and 'judicial review'.¹⁹ The concept of judicial review power comprises, *inter alia*, judicial review of legislative action, judicial review of judicial decisions, judicial review of administrative action and judicial review of fundamental rights.²⁰ The judges of the Supreme Court of Bangladesh have been entrusted with the task of upholding the Constitution and this task is being performed by the Supreme Court through the process of judicial review. The basis of judicial review is the provisions in article 102 of the Constitution which is inextricably linked with the genesis of the Constitution and cannot be construed independently of the scheme and objectives of the Constitution.²¹ Articles 7, 44 read with article 102 of the Constitution have established the power of the Supreme Court to declare void any provision of law on the ground of inconsistency with any provision of the Constitution and the Supreme Court has been exercising that power in all judicial review applications under article 102.²²

¹⁵ Smith (n 13) 168.

¹⁶ KC Wheare, *The Modern Constitutions* (OUP 1966) 34.

¹⁷ Mahmudul Islam, *Constitutional Law of Bangladesh* (Mollick Brothers, Dhaka 2012) 590.

¹⁸ Article 7, *Anwar Hossain Chowdhury v Bangladesh* (1989) BLD (SPI) 1.

¹⁹ *ibid.* [103].

²⁰ AK Brohi, *The Fundamental Law of Pakistan* (Din Mohammad Press, Karachi 1959) 23; also, Sharifuddin Pirzada, *Fundamental Rights and Constitutional Remedies in Pakistan* (All Pakistan Legal Decisions, Lahore 1966) 17.

²¹ Islam (n 17) 489.

²² *Kudrat-E-Elahi v Bangladesh* [1992] 44 DLR (AD) 319.

20.3.1 *Contents of Different Types of Writs in Article 102(2)*

Article 101 of the Constitution stipulates in general that the HCD shall have such jurisdiction as are conferred by the Constitution and other laws. In line with this constitutional text, article 102 confers on the HCD, in specific, the original jurisdiction in the case of writ matters. The names of various writs have not been used in article 102 but the true contents of each of the major writs have been set out in self-contained propositions as emphasised by Dr. Kamal Hossain in the Constituent Assembly Debate.²³ Of the five types of writ petitions outlined in article 102, the writs of mandamus, certiorari and habeas corpus have occupied almost the whole area of constitutional law in the country and the writ of qua-warranto and prohibition has the least application.²⁴

It is beyond the limit of this chapter to discuss every heading of these writs with critical analysis. However, in line with the heading of this chapter and introduction on ‘form’ of public law, the chapter now discusses the form or procedure of judicial review power and how this ‘form’ has undermined, and in many cases, the substantive remedies under judicial review jurisdiction. Although there are many procedural areas which hinder the delivery of substantive remedies in public law, given the word limit, this chapter examines only eight areas of procedure, namely (i) procedural framework under the Rules of the Supreme Court, (ii) interim, consequential and main relief, (iii) administrative power of the Chief Justice, (iv) absence of cost order procedure, (v) the effect of a judgment passed in writ jurisdiction and repetition of filing writs on similar matters, (vi) criminal cases and seeking writ remedies on the self-same matters, (vii) violation of the principle of natural justice; and (viii) unfair procedure of ‘no-prosecution’.

20.3.2 *Imperfect Framework of Writ Jurisdiction*

It is argued here in particular that although the HCD has developed a variety of principles and procedure under its writ jurisdiction, these are not coherent or impeccable in many respects and they hinder the impact and development of substantive remedies through writ jurisdiction. Although the main basis of procedural aspect of writ jurisdiction is the Supreme Court (High Court Division) Rules, 1973 (amended in 2012)²⁵ and some customary procedure, there are concerns on their effectiveness.

First, many vital issues like cost order, fees, charges, requisites, sending and requesting for lower court records (LCR) from lower court and its consequences on failure to do so by the court keepers and Bench Officers remain outdated and do not fit with high expenses and rising court fees and lawyers’ fees on the part of the litigants.²⁶

²³ MA Halim, *Constituent Assembly Debate* (CCB Foundation, Dhaka 2015) 490–491.

²⁴ For details see Halim vol 1 (n 12) 13–176.

²⁵ Gazette notification No. 181-G of 22 October 2012.

²⁶ Halim (n 12) 140.

Second, no provision of fine or penalty has been made for errant clerks or persons who work in collaboration with some dishonest Bench Officers.²⁷

Third, no provision has been made in the Rules²⁸ to impose obligation upon the Section Heads, particularly of the Writ Section, to make the Rule or file ready once notice has been served. It is not unusual that the Section Head and staff just wait for lobbying (or tips) from the parties and if none of the parties turn up, the file or the rule is never ready for hearing. This negligent procedural system does, in no way, fit with the disposal of substantive justice, when it is particularly established that procedural difficulties should not be any basis to frustrate substantive justice.²⁹

Fourth, there is no uniform guideline on submission of requisites³⁰ and its consequences. Every Bench seems to have its own requirement which adds sufferings to the advocates for no fault of their own. Once a Rule Nisi is issued by any Bench, it is the duty of the petitioner's lawyer or his clerk to submit requisites within 48 h. If requisites are not submitted mistakenly or for any other reason, within the time, the consequence, often, is to lose the substantive right. These differences on procedure from Bench to Bench are hit by 'due process' clause. There should be an obligation on the part of the Section Officer to inform the petitioner (it is now mandatory to write the petitioner's lawyers' names on the petition) or at least send an SMS that requisites have not been submitted and in that case, the learned lawyer can take effective steps to submit requisites.

Fifth, there is no common guideline on writ-rule hearing by the Benches. Every Bench has its own unwritten rule which adds sufferings to the lawyers and does, in no way, aid access to justice. Many Benches are of the view that without the appearance of the Petitioner's lawyer, a writ-rule cannot be heard. This view seems completely wrong as writ jurisdiction is based on affidavit only and as such a writ petition may be heard without the presence of the petitioner's lawyer. If the petitioner's lawyer does not turn up even if his/her name is on the list, some Judges are of the view that still they cannot hear the matter, of course, they do not show any reason why they cannot. This stand of the judges goes against the principle of 'justice and fairness' in public law.³¹ This is because the court issues a rule under the domain of public law, and it serves a public interest when a public dispute is resolved. Again, it is often seen that some Judges hear the writ Rule with the presence of the Respondent's lawyer only. There is nothing wrong with this system as the whole jurisdiction is based on affidavit-evidence. Many of the judges are of the view that in the absence of the petitioner's lawyer the writ petition will treated

²⁷ *ibid.* 13–75.

²⁸ 'Rule' here means the 'show cause notice' issued in a writ petition on its motion hearing or first hearing.

²⁹ Halim (n 12) 73; more on this see *M.C. Mehta v. State of Tamil Nadu and Others* (1996) 6 SCC 756 and *Tayeab Vs. Bangladesh* 67 DLR (AD) 57.

³⁰ Requisites means the instrument by which money is submitted by the petitioner for service of notices of the respondents.

³¹ MA Halim, *The Supreme Court and Administration of Justice: Problems and Prospects* (CCB Foundation, Dhaka 2016) 77–80.

as discharged for default or dismissed for default (DD). However, an order of DD is not treated as judgment and it never works as *res judicata* and many writs are filed on the same law points which kills valuable time of the courts.³² If there is a clear rule that in the absence of the petitioner, the judges should hear the respondents and take grounds from the Writ Petition on petitioner's side and then declare judgment, there will be certainty in delivering public law remedies and at the same time this will have effect of reducing a huge number of writs on similar issues.

Sixth, there is a difficult procedure on the submission of affidavit-in-opposition in a writ hearing Bench. *Vakalatnama* or power, on the other hand, can be submitted either in the open court or in the writ-section in a formal way. However, there is no rule or procedure to file affidavit-in-opposition either in the open court or in the writ-section. This often causes injustice on the part of the respondents. Sometimes the respondent's lawyer prepares an affidavit-in-opposition and gets it served upon the petitioner's lawyer, but the court usually does not accept it to be 'kept in the record'. It is rather a strange rule that every court will say 'keep the affidavit with you and submit it when we start hearing'. If, however, the respondents change the lawyer or somehow the affidavit-in-opposition is lost, and the matter is taken up for hearing and the respondent's lawyer is absent, the court is duty bound to accept the version of the petitioner's case and give judgment on the basis of the petitioner's affidavit,³³ and here the court misses the chance of examining the affidavit by the respondents. Certainly, a judgment based on the sole version of the petitioner's case is not a good judgment and it breaches the rule of 'procedural due process'. Thus, there should be a rule that affidavit-in-opposition should be 'kept in the record' whenever it is submitted before any hearing Bench. It is to be borne in mind that the Supreme Court is a court of record, and it is also the last resort to seek justice and it is also the duty of the judges to see that justice is not frustrated for technical reasons.

20.4 Interim, Consequential and Main Relief in Writ Jurisdiction: An Area of Great Uncertainty

Both the Appellate Division of the Supreme Court (AD) and HCD have, arguably, failed to develop and maintain any standard rules to be followed in providing interim, consequential and main relief or reliefs sought in any writ petition. Interim relief is ancillary to the main relief and such relief is given in aid of or ancillary to the main relief which may be available to the petitioner on final determination of his petition. Thus, while passing ad-interim order the HCD is required to see whether the relief so granted amounts to granting the entire reliefs sought for in the

³² See *Mridha Trade International v Secretary, Ministry of Commerce* 3 CLR(HCD) 65, *Asian Traders v Ministry of Commerce* 3 CLR(HCD) 53.

³³ When no affidavit-in-opposition was filed before the HCD denying or controverting the case of the writ-petitioners, the HCD had no other option but to accept the case of the petitioner, *Bangladesh Vs. Gazi Shafiqul and Others* 19 BLC(AD) 163.

substantive prayer in the petition.³⁴ In *Ministry of Establishment v Amjad Hossain*³⁵ question was raised whether the phrase in the prayer of a writ petition 'such other or further order or orders as to your Lordships may seem fit and proper may kindly be passed' permit the HCD to go beyond the terms of the Rule. The AD held that such phrase in prayer part does not authorise a writ court to give relief beyond the Rule issuing order. It permits the court to give any incidental relief or reliefs which may follow from the main relief according to the Rule issuing order.³⁶ The AD reiterated its restrictive view again in *Bangladesh v Nurul Amin and others*.³⁷

However, the above view of the apex court of Bangladesh seems to be wrong in view of a milestone decision in *Mehta*³⁸ by the Indian Supreme Court which held:

It is undoubtedly true that the petitioner could have applied for amendment of the writ petition so as to include a claim for compensation but merely because he did not do so, the application for compensation made...cannot be thrown out. We cannot adopt a hyper-technical approach which would defeat the ends of justice. The court must look at the substance and not the form.³⁹

In this case the Indian Supreme Court further held that even if a letter is addressed to an individual judge, it should be entertained, provided that it is by or on behalf of a person in custody or on behalf of a woman or child or a class or deprived or disadvantaged persons. Unfortunately, the AD remained inactive and its decision in *Amjad Hossain* case is still a big restraint for the HCD to take active role in enforcing fundamental rights for citizens. This view of the AD in *Nurul Amin* is also violative of its own decision in *Tayeeb v Bangladesh*⁴⁰ in which it held specifically that for violation of fundamental rights anyone can approach the HCD, and it can issue rule *suo moto* on the basis of a report or a letter. *The Court held specifically that the fundamental rights guaranteed under the Constitution would be meaningless to the inhabitants of this country, if their remedy is impeded for want of an application* (emphasis added).

³⁴*Agrani Bank v Essential Garments Ltd*, 26 BLD (AD) 93; see also *Managing Committee of Mohammadpur Girls High School v Fazlur Rahman Kahn and Others* 39 DLR 355; *Dr. Jamshed Bakht v Murad Ahmed* 1982 BLD (AD) 154.

³⁵(2014) 2 CLR (AD) 107.

³⁶*Tayeeb v Bangladesh*, 67 DLR(AD) 57 [195–196].

³⁷*Bangladesh v Nurul Amin and Others* [2015] 3 CLR(AD) 410.

³⁸*M.C. Mehta v Union of India and Others* 1987 AIR SC 1086 = 1987 SCR(1) 819; A similar case on this point is *Sheel Bose v State of Maharashtra*, AIR 1983 SC 378. In this case the Indian Supreme Court held that where the court is so satisfied, *prima facie*, it may not insist on the filing of an affidavit and may proceed to investigate into allegations with a view to meeting out justice to the persons on whose behalf the communication is addressed particularly where to insist upon an affidavit at the initial stage may lead to perpetration of injustice or may give rise to a situation where from a practical point of view the doors of justice would be closed to the poor and the disadvantaged. References in this connection are *Mukesh Kumar v State of MP*, AIR 1985 SC 1363; *State of West Bengal v Sampal Lal*, AIR 1985 SC 195; *State of HP v Parents of Students Medical College*, AIR 1985 SC 910; *Malik Brothers v Narendra Dadich*, AIR 1999 SC 3211.

³⁹*ibid.*, *Mehta*, Per Bhagwati J.

⁴⁰67 [2015] DLR(AD) 57.

20.4.1 *Administrative Power of the Chief Justice in Writ Jurisdiction: Issue of Fairness*

The administrative power of the Chief Justice (CJ) which affects the fair hearing of writ jurisdiction in the HCD, it is argued, is violative of 'due process' clause in the Constitution.⁴¹ The HCD Rules empowers the CJ to enlist any matter into the daily cause list of a hearing Bench. However, it does not specify how this power will be exercised.⁴² One usual course of channeling this power is exercised when two judges of a Bench feel embarrassed or are of the opinion that a pending matter should be referred to the CJ for putting before any other Bench. In such a case the CJ will usually see the file and send to another appropriate Bench for hearing. It is often criticized that the concerned section of the CJ's office deals with these files inefficiently and many members of the Bar have raised questions on misuse of this power by the CJ.⁴³

When the CJ himself puts some writ petitions for hearing on the daily cause list, he does this in his administrative capacity which, again, is challengeable under judicial review. It is contended that his power of the CJ is violative of the principle of natural justice as it offends the principle of equality of 'right to a fair hearing'. The power of the CJ also offends the principle of fairness as this power lacks any due process. It is often seen that the CJ puts some recent rules for hearing whilst thousands of back-dated rules cannot be heard for ages. No lawyer, not even a presiding judge in a writ motion Bench has ever issued a show cause notice against the CJ. This is, arguably, due to the absence of fair play in justice dispensation in the Supreme Court.⁴⁴ The CJ himself exercises this arbitrary choice without any rules and judges have concerns that if any *rule nisi* is issued, he/she might lose his/her jurisdiction. A lawyer does not come with an application to challenge such power only because, he/she might be castigated before the Bench of the CJ; he/she may also lose his/her right of audience before many writ benches.⁴⁵

20.4.2 *No Cost-Order Jurisprudence: No Consequence of False Writ Petitions*

One of the vexing problems in disposing of huge number of pending writs in the HCD is the absence of cost-order jurisprudence. The HCD, while delivering judgments in a writ petition, ends with a parrot-type sentence, 'there will be no

⁴¹ Halim (n 24) 21 and (n 31) 74.

⁴² High Court Rules, Chapter V Rule 3(2): 'The Chief Justice may send for inclusion of any matter for disposal and such matter shall be included in the daily cause list at the earliest opportunity'.

⁴³ Halim (n 31) 69–76.

⁴⁴ *ibid.* 76.

⁴⁵ *ibid.* 76.

order as to costs'. If the HCD is to award cost, it must assign reasons for awarding cost, otherwise it might be arbitrary.⁴⁶ This has been the binding rule for HCD and when the Government or any private party knows that even if it loses at the final hearing, there is no consequence, the filing of false writ petitions spirals in number. A policy decision of coherent cost-order, which is largely an administrative work of the Supreme Court, can act as deterrent to not only against petitioners in bringing false petitions but also against the Government and other statutory authorities so that they can be apprehended that in case they fail, they must end up ultimately with paying the huge cost to the petitioners. This cost order strategy can significantly reduce the stress of backlog of writ petitions in the HCD.⁴⁷

20.4.3 Effect of a Judgment in Writ Jurisdiction and Repetition of Filing Writs on the Same Matter

As part of procedural justice, the HCD still needs to develop its strategic procedure in judicial review. It was only in 2008 when the HCD held in *Rahat Bin Habib v Bangladesh*⁴⁸ that its judgment given in writ petition may operate in *rem*. In particular, the court held that where a specific action of the Government or statutory authority affects many persons and that action has been found to be without lawful authority at the instance of a few, the decision ensures the benefit of all those who have been affected and not limited to those only who challenged the action or inaction. However, unfortunately this decision has rarely been complied with either by the HCD or by the Government. The petitions are filed on daily basis on the self-same matter affecting large number of people with service contracts or job relationship with the Government though the rationale has already been laid down. These repeated petitions are admitted by the Benches as new motions on a mere ground that it is the source of the livelihood of lawyers and hence the practice should be allowed.⁴⁹

20.4.4 Criminal Case and Seeking Relief in Writ Petition

In last 50 years the Supreme Court seems to have failed to develop any coherent jurisprudence on entertaining writ petitions when a criminal charge is pending before a competent court on the same legal issue. In one writ petition the HCD

⁴⁶ *Moudud Ahmed v Anwar Hussain Khan* (1995) BLD (AD) 12.

⁴⁷ Halim (n 31) 71–76. One must not confuse 'cost order' with 'donation order'. Donation orders issued by the HCD are, arguably, illegal orders whilst 'cost orders' are legal and should be usual. Halim (n 31) 15–34.

⁴⁸ (2008) 60 DLR (HCD) 687

⁴⁹ Halim (n 31) 74. As a practitioner for a long time the author has witnessed this time-wasting practice by the court.

held that an action taken without lawful authority could be challenged in a writ petition even though a criminal case was pending against the petitioner who did not appear before the criminal court.⁵⁰ However, in another case the same court held that an informant or witness in a criminal case was not an aggrieved person (competent person) to challenge the legality of an order terminating the appointment of a public prosecutor.⁵¹ Again, it is a settled principle of both criminal law and public law that a fugitive from justice has no right to claim any relief from a court.⁵² However, this rule has been found honoured in breaches rather than in compliance. For example, where an arms licence has been cancelled in violation of principle of natural justice, the licensee cannot be debarred from seeking relief in writ jurisdiction on the ground of pendency of criminal case against him or for his non-appearance in such criminal case.⁵³ Here the HCD has failed to develop any consistent guiding principle of dividing line where there is criminal case pending.

20.4.5 Violation of the Principle of Natural Justice in Writ Procedure

It has been a time-honoured judicial principle that a motion Bench shall not dispose of a writ petition without issuing a rule nisi. However, there is a recent trend among some judges in the HCD to issue direction instead of issuing rule violating the principle of natural justice.⁵⁴ In this regard the AD held that without issuing Rule while disposing of the application under article 102 of the Constitution the HCD was not authorised in law to pass any ad-interim relief which it could pass in aid of or ancillary to the main relief upon final determination of the rights of parties.⁵⁵ There are strong arguments that this practice has negative effects on substantive justice under public law.⁵⁶

⁵⁰ *Shafiqul Islam v Bangladesh* (2004) 56 DLR 239; also, *Jahangir Hawladar v CMM* (2006) 58 DLR 106.

⁵¹ *S.M. Zillur Rahman v Bangladesh* (2004) 56 DLR (AD) 127.

⁵² *ACC v Mahmud Hossain* 61 DLR (AD) 17; *ACC v HBM Iqbal* 15 BLC(AD) 44; *ACCM v ATM Nazimulla Chowdhury* 62 DLR (AD) 225.

⁵³ *Shafiqul* (n 50).

⁵⁴ *Haji Md. Shah Alam v Government of Bangladesh* WP No. 4722 of 2009, direction issued on 29 June 2009; *Nuruzzaman v Government* WP No. 10307 of 2007, direction issued on 2 December 2007; for more on this, see Halim vol 2 (n 24) 33–39.

⁵⁵ *Bangladesh Bank and others v. Zafar Ahmed Chowdhury and another* 56 DLR (AD) 175; for more on this, see Halim vol 2 (n 24) pp.33–39.

⁵⁶ Halim vol 2 (n 24) 33–39.

20.4.6 *The Procedure of Non-Prosecution: Unfair Form of Public Law Justice*

Getting Rule and stay and enjoying benefits of judicial order from the HCD for a long time by the petitioner has an obvious adverse impact on the justice delivery system under the public law. However, the procedure of approaching with a non-prosecution order at the end of substantive hearing has far reaching negative impact on public law. Usually in the following two situations the petitioners' lawyers approach the court for non-prosecution of a rule: (i) when the petitioner has already enjoyed the benefits of Rule and stay at the cost of Supreme Court's justice delivery system. Petitioner now feels that since he has got what he wanted and there is nothing more to do with the stay, he prays for non-prosecution. And (ii) after enjoying the benefit of stay for several years when at the stage of hearing the petitioner thinks that there is no chance of making the rule absolute, he/she prays for non-prosecution. In either of the cases the HCD should not allow prayer for non-prosecution as a mechanical way of disposing of public law disputes.

There are two significant consequences upon the public law if the above procedure is allowed. First, non-prosecution order is never reported; and it does not operate as *res judicata* and as such the same or similar matter comes up before the HCD and valuable time of the apex court is wasted by entertaining meritless litigations. Secondly, a writ petition is entertained and litigated only on point of public law having a public interest and if that law point is not settled down, there will be scope for other people to agitate the same issue before it giving rise to multiplicity of writ petitions. And third, it is argued that special cost should, in appropriate cases, be a general rule when a petitioner makes prayer for non-prosecution, or the rule is discharged for non-prosecution.⁵⁷

20.5 Conclusion

Given the above discussion on some aspects of the procedural jurisdiction as against the substantive writ jurisdiction in the Supreme Court, it cannot be said that this procedural lacunae in the writ jurisdiction show any matured and developed position of the public law dispute disposal. A few more conclusions may be made. First, the existing method of forms and procedure followed by the HCD in disposing of substantive justice through writ hearings are extremely deficient to the norms of standard rule-oriented jurisprudence. Secondly, in most cases the adherence to the procedure has been a kind of force-based disposal as opposed to rule-based disposal in discharging substantive justice through the writ jurisdiction. Thirdly, with the

⁵⁷ Halim vol 1 (n 24) 4–20; also Halim (n 31) 77–80.

prevalence of inconsistent and incoherent procedure for over 50 years, the substantive justice in many cases has been denied to many litigants under the public law domain. And fourthly, the substantive justice of public law often remains unrealised due to the unfair procedure of public law which the Supreme Court should develop for the sake of institutionalisation of public justice.

References

Books

- Craig, Paul. 2005. *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*. Routledge.
- Fuller, Lon L. 1969. *Morality of Law*. New Haven: Yale University Press.
- Halim, M.A. 2015. *Constituent Assembly Debate*. Dhaka: CCB Foundation.
- . 2016. *The Supreme Court and Administration of Justice: Problems and Prospects*. Dhaka: CCB Foundation.
- . 2018. *Practice and Procedure in the Supreme Court*. Dhaka: CCB Foundation.
- Islam, Mahmudul. 2012. *Constitutional Law of Bangladesh*. Dhaka: Mollick Brothers.
- Jackson, Paul. 1979. *Natural Justice*. London: Sweet and Maxwell.
- Pirzada, Sharifuddin. 1966. *Fundamental Rights and Constitutional Remedies in Pakistan*. All Pakistan Legal Decisions, Lahore.
- Summers, R.S. 2006. *Form and Function in a Legal System: A General Study*. Cambridge: Cambridge Google Scholar.

Chapters in Edited Books

- Dworkin, Ronald. 1981. Principle, Policy, Procedure. In *Crime, Proof and Punishment*, ed. C.F.H. Tapper, 193–225. London: Butterworths.
- Fuller, Lon L. 2001. The Forms and Limits of Adjudication. In *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. K.I. Winston, 111. Oxford: OUP.
- Golding, M.P. 1999. My Philosophy of Law. In *The Law in Philosophical Perspectives*, ed. L.J. Wintgens, 122–123. London: Springer.

Articles

- Arnold, Thurman. 1932. The Role of Substantive Law and Procedure in the Legal Process. *Harvard Law Review* 45 (4): 617–647.
- Bayles, M. 1986. Principles for Legal Procedure. *Journal of Law & Philosophy* 5 (1): 33–57.
- Dyzenhaus, D. 2015, 2015. Process and Substance as Aspects of the Public Law Form. *The Cambridge Law Journal* 74 (2): 284–306.
- Waldron, J. 1989. The Rule of Law in Contemporary Liberal Theory. *Ratio Juris* 2 (1): 79–96.
- . 2011. The Rule of Law and the Importance of Procedure. *50 NOMOS: American Society for Political and Legal Philosophy* 1: 3–31.

Md Abdul Halim Bar-at-Law, is a legal practitioner with the Supreme Court. In addition to his LLB Hons and LLM from Dhaka University, he received an LLM in international trade law from the University of Newcastle where he was a Chevening Scholar. He has written over 60 law books including in the field of Bangladeshi constitutional law. Mr. Halim is a leading public law practitioner, with a special reputation for public interest litigations for the protection of rights of children and other vulnerable groups. To his credit, he has several wins in public law compensation cases before the Supreme Court of Bangladesh. He is currently the honorary Chairman of *CCB Foundation* that works *pro bono* for the promotion and protection of children's rights and education. He was invited by National Law University, New Delhi in 2017 as research scholar and to participate in teaching comparative legal systems.

Chapter 21

Emergency Powers and Martial Law Under the Constitution of Bangladesh



M Ehteshamul Bari

Abstract The Constitution of Bangladesh 1972 did not originally contain any provisions for the executive to proclaim an emergency or a martial law. The frequent abuse of these extraordinary powers during the days when Bangladesh was a province of Pakistan led the framers not to incorporate such powers in the Constitution. However, the necessity to insert a new Part IXA in the Constitution, titled ‘Emergency Provisions’, was felt immediately after the Constitution came into force. Part IXA not only empowers the executive to proclaim an emergency to deal with actual or imminent threats posed to Bangladesh, but also to suspend the enforcement of fundamental rights during the emergency. This chapter demonstrates that in the absence of effective safeguards in the Constitution constraining the scope of the exercise of emergency powers, these powers have been conveniently used to subvert the rule of law and impose unwarranted restrictions on the fundamental human rights of individuals. It also sheds light on the fact that, notwithstanding the absence of any reference to the concept of martial law in the Constitution, Bangladesh witnessed two declarations of martial law in 1975 and 1982. Although the Supreme Court declared both proclamations of martial law illegal in 2010, it has not examined whether any of the five proclamations of emergency issued under Part IXA were without jurisdiction or *mala fide*. The chapter concludes with some suggestions for preventing the use of these powers for extraneous purposes.

Keywords Emergency power · Martial law · Executive proclamation · President · Parliament · Fundamental rights enforcement · Safeguards · Rule of law · Judicial responses

M. E. Bari (✉)

Thomas More Law School, Australian Catholic University, Melbourne, Australia
e-mail: me.bari@acu.edu.au

© The Author(s), under exclusive license to Springer Nature Singapore Pte Ltd. 2023

M. R. Islam, M. E. Haque (eds.), *The Constitutional Law of Bangladesh*,
https://doi.org/10.1007/978-981-99-2579-7_21

21.1 Introduction

When the very life of a state and its subjects are threatened by grave crises, such as war, external aggression, rebellion, civil war, natural disasters, pandemics, or breakdown in the economy, it becomes necessary to invoke the extraordinary powers of emergency. For the enormity of the threats posed by such crises renders the normal measures prescribed by the ordinary legal framework ineffective for restoring normalcy. Thus, emergency powers are invoked as a 'last resort' in self-defence to tide over the grave threats facing a nation and its inhabitants.¹ Generally, the executive branch of the government derives its authority to resort to emergency powers from either constitutional or extra-constitutional sources.

Under the constitutional model, the authority of the executive to proclaim a state of emergency is usually derived from the supreme law of a nation, namely, the constitution. However, it is a common feature of modern constitutions to articulate the grounds for proclaiming an emergency in a rather 'broad and imprecise manner',² thereby enabling the executive to blur the distinction between grave circumstances, such as war or external aggression, and ordinary protests against its arbitrary policies. It is also common for the emergency framework under most modern constitutions to refrain from stipulating the safeguards necessary for constraining the broad scope of emergency powers and for ensuring that they are not continued beyond their imperative necessities.³ Since a proclamation of emergency is invariably followed by the suspension of the enforcement of human rights, the absence of effective constitutional safeguards allows the political branches of the government to take concrete measures for institutionalising the emergency at the expense of the rights of citizens.

For instance, in the absence of effective mechanisms under the emergency framework of the Constitution of Malaysia 1957, for ensuring that emergencies are not continued beyond the circumstances which warranted their invocation, successive generations of executives in Malaysia have used proclamations of emergency as the vehicle for subverting the rule of law and violating the human rights of individuals. The four emergencies proclaimed between 1964 and 1977 to deal with situations ranging from hostilities with neighbouring nations and communal riots to political turmoil, remained in force until December 2011.⁴ In addition to these proclamations being continued long after the conditions that triggered them had abated, they were conveniently used to enact several ordinary laws, including the *Internal Security Act* 1960, the *Emergency (Security Cases) Regulations* 1975 and the *Societies Act* 1966. These laws had an adverse impact on several fundamental rights of individuals as

¹ ICJ, *States of Emergency: Their impact on Human Rights* (International Commission of Jurists, Geneva, 1983) 17, 190.

² M Ehteshamul Bari, *States of Emergency and the Law: The Experience of Bangladesh* (Routledge 2017) 21.

³ *ibid.*

⁴ ICJ (n 1) 416.

they not only permitted prolonged detention but also restricted ‘freedom of movement, freedom of association and expression, trade union rights, due process rights and political rights’.⁵

Since the outbreak of the COVID-19 pandemic, two more emergencies had been proclaimed in Malaysia. The first one was invoked on 16 December 2020 to stop by-elections in two constituencies in the states of Sabah and Perak amid growing number of COVID-19 infections and deaths.⁶ And the second proclamation was invoked on 11 January 2021 to apparently curb the rapid spread of COVID-19 infections in the nation.⁷ Notwithstanding the stated objective underlying the invocation of the most recent emergency in Malaysia, it seems that this was proclaimed to ensure the then Prime Minister Muhiyuddin’s survival in office. For the emergency was proclaimed at a time when Muhiyuddin’s coalition allies had threatened to withdraw support for his minority government. This suspicion that the emergency was proclaimed for reasons other than safeguarding the well-being of Malaysians gained further momentum when the proclamation of emergency also suspended parliamentary sitting, thereby obviating the possibility of any no-confidence motion being brought against the government of Muhiyuddin.⁸ It is pertinent to note here that the suspension of the Parliament paved the way for the executive to exercise its ordinance making powers for imposing restrictions on the rights of individuals. Thus, it is evident that Malaysians have become accustomed to their rights being trampled under the pretext of emergencies.

The alternative model to the constitutional model, namely, the doctrine of necessity is premised on the idea that the exigencies of a threat posed to the life of the nation may be so grave that they necessitate the resort to emergency measures that would otherwise be unlawful. The idea underlying the doctrine was aptly captured by Wiener: ‘Necessity calls it forth, necessity justifies its exercise ... That necessity is no formal, artificial, legalistic concept but an actual and factual one: it is the necessity of taking action to safeguard the state against insurrection, riot, disorder or public calamity.’⁹ Thus, the resort to the doctrine is circumscribed by the necessity of safeguarding the integrity and cohesion of the state against actual threats.

Since constitutions do not generally envisage the resort to the doctrine of necessity, its invocation can duly be termed extra-constitutional. However, there are contemporary theorists, such as FM Brookfield and George Williams, who maintain

⁵ *ibid.*

⁶ ‘Malaysia Invokes Emergency to Stop By-Elections as COVID-19 Cases Rise’, *Reuters* (Kuala Lumpur, 16 December 2020) <<https://www.usnews.com/news/world/articles/2020-12-16/malaysia-invokes-emergency-to-stop-by-elections-as-covid-19-cases-rise>> accessed 20 December 2021.

⁷ Rebecca Ratcliffe, ‘Malaysia Declares Covid State of Emergency Amid Political Turmoil’, *The Guardian* (Bangkok, 12 January 2021) <<https://www.theguardian.com/world/2021/jan/12/malaysia-declares-covid-state-of-emergency-amid-political-turmoil>> accessed 20 December 2021.

⁸ *ibid.*

⁹ FB Wiener, *A Practical Manual of Martial Law* (Military Service Publishing Co 1940) 16.

that the resort to the doctrine is not extra-constitutional.¹⁰ For its resort, according to them, are not only constrained by the requirement of dealing with grave threats but also maintaining 'the rule of law and the existing legal order'.¹¹ However, history is replete with evidence to the contrary. For instance, in the absence of any constitutional limits defining the scope of the executive authority, the doctrine of necessity can be used as the convenient means of perpetuating power by abrogating the existing constitutional order. In this context, reference can be made to the instance of the invocation of the doctrine in Pakistan by President Iskander Mirza on 7 October 1958 to proclaim martial law throughout the country. This doctrine, however, was not resorted to tide over actual threats posed to the life of Pakistan or preserve the sanctity of the country's constitutional order. Rather it was invoked to maintain Mirza's grip on power. For the invocation of the doctrine was not only followed by the abrogation of the country's first Constitution but also the banning of all the political parties.¹² Strikingly, the 'destruction of the ... Constitution' was upheld by the Supreme Court of Pakistan as being a valid consequence of Mirza's resort to the doctrine.¹³ As Chief Justice Muhammad Munir observed while delivering the judgment: 'It sometimes happens ... that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution ... [The] legal effect [of any such change] is not only the destruction of the existing Constitution but also the validity of the ... [new] legal order.'¹⁴

The measures undertaken by Mirza under the guise of the doctrine of necessity and their subsequent validation by the Supreme Court set a dangerous precedent for invoking the doctrine as the most convenient means of usurping or perpetuating power after either abrogating the constitutional order or keeping it in abeyance.¹⁵ Thus, it is manifestly evident that in the absence of any constitutional constraints confining the executive's power to invoke the doctrine of necessity to respond to grave threats and preserve the sanctity of the legal order, the doctrine grants the executive wide scope to abuse the extraordinary powers concerning emergency and can be appropriately deemed extra-constitutional.

The distinct possibility of abuse under both constitutional and extra-constitutional models of emergency powers has persuaded theorists, such as Bruce Ackerman and William E Scheuerman, who are referred to as democratic formalists, to argue that the root cause of the subversion of the rule of law and violation of the fundamental human rights of emergencies is the absence of effective *ex ante*

¹⁰ George Williams, 'The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji' (2001) 1(1) *Oxford University Commonwealth Law Journal* 73, 80.

¹¹ *ibid.*; FM Brookfield, 'The Fiji Revolutions of 1987' (1988) NZLJ 250, 251.

¹² K Sarwar Hasan, 'The New Constitution of Pakistan' (1962) 16(2) *Parliamentary Affairs* 174, 174–5; Susheela Kaushik, 'Constitution of Pakistan at Work' (1963) 3(8) *Asian Survey* 384, 384.

¹³ *State v Dosso* (1958) 10 PLD (SC) [533, 538].

¹⁴ *ibid.* [538].

¹⁵ Bari, *States of Emergency* (n 2) 25–6.

constitutional mechanisms.¹⁶ They contend that the absence of such mechanisms also dissuades judges from engaging in ‘energetic enquiry’ to discern whether there are valid reasons warranting the proclamation of an emergency and their subsequent continuation.¹⁷ Consequently, Ackerman and Scheuerman advocate for detailed constitutional norms governing every aspect of an emergency, including its proclamation, administration and termination, so as to limit the possibility for the executive to use emergencies as a vehicle for imposing unwarranted restrictions on the human rights of individuals. They place emphasise on the necessity of emergency measures being periodically scrutinised by the elected legislature as it is the appropriate avenue for facilitating ‘free-wheeling democratic deliberation and debate’.¹⁸ To this end, the formalists took inspiration from the mechanisms prescribed by the Constitution of South Africa 1996.

The South African Constitution not only confines the executive’s authority to proclaim an emergency to circumstances, such as war, invasion, insurrection and natural disaster,¹⁹ which truly endanger the life of the state, and curtails its discretion to dispense with the rights of individuals at its whim by incorporating a list of rights from which no derogation can be made under any circumstances,²⁰ but also subjects the proclamation of emergency and the resultant measures to increasing supermajorities of Parliament. It provides that any attempt to extend a proclamation of emergency for a period not exceeding 90 days must be supported by a simple majority in Parliament while any subsequent proposal to extend the emergency must be supported by ‘at least 60 per cent of the members of the Parliament’.²¹ The formalists argue that the utility of this mechanism prescribed by the South African Constitution is that it prevents the executive from clinging on to emergency powers beyond the circumstances that warranted their exercise. Furthermore, they contend that the insertion of detailed safeguards concerning emergency powers in the Constitution provides the judiciary with the objective standards for assessing the constitutionality of the resort to emergency powers.

Thus, it is evident that the formalist model envisages a role for each of the three branches of the government in maintaining the rule of law and safeguarding the enjoyment of the fundamental human rights of individuals during emergency situations. Since the model articulated by Ackerman and Scheuerman prescribes meaningful safeguards for preventing the executive from institutionalising a state of emergency at the expense of the rights of individuals, it arguably has the prospect of upholding the rule of law and the fundamental human rights during grave threats endangering the life of the nation.

¹⁶William Scheuerman, ‘Emergency Powers and the Rule of Law After 9/11’ (2006) 14(1) *The Journal of Political Philosophy* 61, 76; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age Terrorism* (Yale University Press 2006) 80.

¹⁷Bruce Ackerman, ‘The Emergency Constitution’ (2003–2004) 113 Yale LJ 1029, 1069.

¹⁸Scheuerman (n 16) 76.

¹⁹Constitution of South Africa, 1996 s 37(1)(a).

²⁰*ibid.*, s 37(5).

²¹*ibid.*, s 37(2).

Having shed light on the safeguards which have the potential of avoiding the pathologies of emergency governments, attention will now be turned to the focal point of this chapter, an examination of emergency powers and martial law under the Bangladesh Constitution. When Bangladesh achieved its independence from Pakistan on 16 December 1971 after a nine-month long brutal war of independence, the founding fathers sought to establish a society based on democratic virtues, namely, the promotion and protection of the rule of law and the human rights of individuals (preamble). To this end, they incorporated extensive guarantees, such as safeguarding the enjoyment of 18 fundamental rights, in the Constitution of Bangladesh 1972. However, since the incorporation of the provisions concerning the proclamation of emergency and suspension of the enforcement of fundamental rights in the Constitution in 1973, emergencies have been invoked in Bangladesh on five separate occasions. Strikingly, most of these emergencies were proclaimed and continued for extraneous purposes.

Moreover, although the Constitution does not make any reference to the concept of martial law, Bangladesh witnessed two declarations of martial law in August 1975 and March 1982. In this chapter, the provisions concerning emergency powers contained in the Constitution will first be examined. It will be shown that the weaknesses of these provisions have permitted the use of emergency powers for discarding the rule of law and indiscriminately violating the fundamental human rights of individuals. Light will then be shed on the two declarations of martial law and the judicial response to these declarations. Finally, this chapter concludes with recommendations for obviating the possibility of the use of the extraordinary powers concerning emergency as the convenient means of undermining the rule of law and depriving citizens of their fundamental rights.

21.2 The Emergency Provisions Under the Constitution of Bangladesh 1972

Prior to emerging as an independent state, Bangladesh was in a union with Pakistan for 24 years from 1947 to 1971. During this period, the inhabitants of Bangladesh frequently witnessed successive governments of Pakistan subverting the rule of law and violating their fundamental rights under the guise of proclamations of emergency and martial law.²² Consequently, in a conscious effort to avoid the disturbing experiences of the past union with Pakistan, it was pledged in the preamble that ‘it shall be a fundamental aim of the State to’ institute ‘a society in which the rule of law, fundamental human rights and freedom, equality and justice ... will be secured for all citizens’.

²² Constituent Assembly of Bangladesh, *Gonoporishoder Bitorko (Constituent Assembly Debate)* (1972) vol 2, 51.

It is further noteworthy that the framers of the Constitution refrained from incorporating any provisions empowering either the executive or parliament to declare an emergency under any circumstances. This represented a stark departure from the constitutional patterns followed in the Indian Subcontinent. The 1950 *Constitution of India* and 1956 *Constitution of Pakistan* contained provisions empowering the executive to declare three types of emergencies, namely, emergency of war, emergency of subversion, and financial emergency.²³ This noticeable absence of emergency provisions from the Constitution was sought to be justified by one of the members of the Constituent Assembly by reference to the repeated abuse of the emergency powers during the days when Bangladesh was a province of Pakistan.²⁴ However, on 22 September 1973, only 9 months and 7 days after the Constitution came into force, a new Part IXA, titled ‘Emergency Provisions’, was inserted in the Constitution empowering the executive to proclaim an emergency and suspend the enforcement of the fundamental rights during the continuation of such an emergency. It seems the then government’s change of heart regarding the desirability of constitutionally entrenched emergency powers stemmed from the necessity to combat the rapidly deteriorating economic and law and order situations. But the government justified the incorporation of emergency powers by means of an amendment to the Constitution on the ground that since ‘these provisions for... proclamation of emergency [were] in the constitution of all democratic countries of the world ... [which] were not incorporated in the Constitution when it was framed... this amendment was introduced to fill up that “omission”’.²⁵

Unlike the Constitutions of India and Pakistan,²⁶ the Constitution of Bangladesh, as amended by the Constitution (Second Amendment) Act 1973, empowers the President under Article 141A to declare an emergency only on the grounds of war, external aggression, and internal disturbance. Thus, the power to invoke the extraordinary power of emergency has been confined to responding to threats posed to the life of the nation. The President’s power to respond to actual threats has also been supplemented with the power to proclaim emergencies even before the state’s life is threatened by war or external aggression or internal disturbance if he/she ‘is satisfied that there is imminent danger thereof’ (art 141A(3)).

It is striking that the Constitution, as amended in 1973, does not attempt to circumscribe the power of the executive to declare emergencies to precise grounds which truly endanger the security of the nation. For, the phrase ‘internal disturbance’, as mentioned as one of the grounds for invoking a state of emergency, does not connote any precise definition. Thus, what constitutes internal disturbance in any given case would be determined in accordance with the assessment of the executive.

²³ Constitution of India, art. 360(1); Constitution of Pakistan, arts 191(1), 194.

²⁴ Constituent Assembly of Bangladesh (n 22).

²⁵ Moudud Ahmed, *Bangladesh: Era of Sheikh Mujibur Rahman* (University Press Ltd., Dhaka 1984) 149.

²⁶ The Constitutions of India and Pakistan authorise their respective head of state to declare three types of emergencies, i.e., emergency of war, emergency of subversion and financial/economic emergency. See Constitution of India, art. 360(1) and Constitution of Pakistan, art 235(1).

This arguably provides the executive with significant leeway to bring a wide range of circumstances, such as protests against unpopular government policies, riots and isolated incidents of violence, within the purview of this ground.²⁷ History is filled with many instances of this ground being misused to declare emergencies for extraneous purposes. For instance, in India, when the Allahabad High Court in June 1975 invalidated Prime Minister Indira Gandhi's election to Parliament on account of corrupt practices, Mrs. Gandhi's response was to advise the President to proclaim an emergency on the ground of internal disturbance. Subsequently, India witnessed unprecedented abuse of the emergency powers to put down anyone considered a threat to Mrs. Gandhi's desire of cementing her grip on power.²⁸ The magnitude of the abuse of the emergency powers by the regime of Mrs. Gandhi during the period between June 1975 and March 1977 persuaded the succeeding government of the Janata Party to pass the *Constitution (Forty-Fourth) Amendment Act 1978*, which, *inter alia*, replaced 'internal disturbance' with 'armed rebellion' as a ground for proclaiming a state of emergency.²⁹

Furthermore, the Constitution does not contain any reliable system of checks and balances for ensuring the effective scrutiny of an emergency proclamation and its timely termination. Rather, the Constitution invests the President with the authority to proclaim an emergency for an initial period of 120 days and authorises only the Parliament to extend the continuation of such an emergency beyond 120 days (art 141A(2)). However, unlike the Constitution of South Africa 1996, the Constitution of Bangladesh does not stipulate that a proclamation of emergency and the consequent emergency measures should be subjected to the approval of increasing supermajorities of Parliament. Consequently, since the executive commands the support of the majority in Parliament, securing the continuation of an emergency beyond the initial 120 days for extraneous purposes seems to be an easy task.

The Constitution in Article 141C(1) also empowers the President to suspend the enforcement of all or any of the 18 fundamental rights guaranteed by the Constitution during the continuation of an emergency. Although this provision granting the executive the unfettered discretion to dispense with the fundamental rights of individuals was incorporated into the Constitution 7 years after the coming into force of the International Covenant on Civil and Political Rights (ICCPR) 1966, it is striking that the fundamental cornerstones of ICCPR, namely, the principles of non-derogation and proportionality,³⁰ were not incorporated into the Constitution for maintaining a delicate balance between safeguarding the security of the nation and simultaneously protecting the fundamental human rights of individuals during a state of emergency. Even Bangladesh's accession to ICCPR in September 2000 has not persuaded the lawmakers to incorporate the principles of non-derogation and proportionality into the Constitution.

²⁷ Bari, *States of Emergency* (n 2) 145–146.

²⁸ *ibid.* 37–39, 96.

²⁹ ICJ (n 1) 189.

³⁰ ICCPR, art. 4(1–2).

Since the insertion of the provisions concerning emergency powers into the Constitution, emergencies have been declared in Bangladesh on five separate occasions on 28 December 1974, 30 May 1981, 27 November 1987, 27 November 1990, and 11 January 2007. Each of these emergencies were invoked on the vague ground of internal disturbance. The magnitude of the abuse in the exercise of emergency powers is exemplified by focusing on the most recent proclamation of emergency in 2007.

21.3 The Proclamation of Emergency in January 2007

Towards the end of the tenure of the government of the Bangladesh Nationalist Party (BNP) in October 2006, Bangladesh witnessed a political deadlock over the issue of the appointment of the head of the Non-Party Caretaker Government (NPCG), which would have been formed for assisting the Election Commission (EC) to conduct the general election scheduled for January 2007.³¹ Since the Bangladesh Awami League (BAL) had reservations about the neutrality of Justice KM Hasan, who was constitutionally destined to take over as the head of the NPCG in his capacity as the immediate past Chief Justice of the country, it organised violent protests to prevent him from taking office. In light of the violence perpetrated by BAL, Justice Hasan declined to assume the responsibilities of the office of the head of the NPCG.³² Following Justice Hasan's refusal, the nation was plunged into yet another crisis. As President Iajuddin Ahmed chose to assume additional responsibilities of the head of the NPCG without meaningfully exhausting the other constitutional options for appointing the same. Since Ahmed's election to the office of the President on a BNP ticket had cast serious doubt on his ability to impartially perform the functions of the office of the head of the NPCG, BAL once again resorted to violent protest.³³

The magnitude of BAL's violent campaign to prevent the holding of the general election scheduled for January 2007 coupled with mounting pressure from western diplomats, who were concerned about protecting their nations' developmental interests, ultimately paved the way for the army to intervene and pressurise President Ahmed to declare an emergency for the fifth time in the country's history— yet again on the vague ground of internal disturbance.³⁴ The declaration of the emergency was followed by the installation a new NPCG. As soon as the new NPCG

³¹ 'Bangladesh Power Shift Postponed', *BBC* (London, 28 October 2006). <http://news.bbc.co.uk/2/hi/south_asia/6093300.stm> accessed 11 April 2022.

³² Tasneem Khalil, 'Dhaka Tries to Fill Power Vacuum', *CNN* (Dhaka, 29 October 2006) <<https://edition.cnn.com/2006/WORLD/asiapcf/10/29/bangladesh/>> accessed 10 April 2022.

³³ Shakhawat Liton, 'President sworn in as Chief of Caretaker Govt', *The Daily Star* (Dhaka, 30 October 2006) <<http://archive.thedailystar.net/2006/10/30/d6103001011.htm>> accessed 10 April 2022.

³⁴ Circular Issued by the Office of the President, 11 January 2007.

was sworn in, the political unrest which was used as the convenient premise to declare an emergency on the ground of internal disturbance came to an end.³⁵ But the emergency was not lifted. Moreover, the NPCG in contravention of its constitutional mandate of assisting the EC in conducting a free and fair general election and of carrying out the routine functions of the government during interim period between the dissolution of Parliament and the election of a new one, deferred the polls indefinitely and undertook several policy initiatives.³⁶ The policy initiatives included the establishment of the National Coordination Committee on Corruption and Serious Crime to persecute the senior leadership of the two major political parties of the country, namely BAL and BNP, on charges of corruption.³⁷

The measures taken by the regime bore resemblance to the manner in which General Pervez Musharraf in Pakistan had used a proclamation of emergency in 1999 to seize power and subsequently crackdown on the senior leadership of the Pakistan People's Party and Pakistan Muslim League.³⁸ The suspicion that the top leadership of the Bangladeshi Army was contemplating the institution of a formal military rule following in the footsteps of Pakistan gained further momentum when the Chief of Army Staff in a speech in April 2007 'signalled the possibility of the rise of a third political force rather than a return to the status quo'.³⁹

21.4 The Impact of the 2007 Proclamation of Emergency on the Fundamental Rights

In taking advantage of the lacuna of the provisions of the Constitution of Bangladesh, which do not shed light on which of the 18 fundamental rights should remain immune to suspension during a proclamation of emergency, the emergency regime of 2007 issued an order suspending the enforcement of all 18 fundamental rights including core rights, such as the right to life and the right not to be subjected to torture or cruel, inhuman or degrading punishment or treatment guaranteed by the Constitution.⁴⁰ Such an indiscriminate move stood in stark contrast to the precedent

³⁵ Bari, *States of Emergency* (n 2) 187.

³⁶ 'CA Vows to Transfer Power Through Polls at Earliest, EC to be Reconstituted, Flawless Electoral Roll to be Prepared', *The Daily Star* (Dhaka, 22 January 2007) 1 <<http://archive.thedailystar.net/2007/01/22/d7012201011.htm>> accessed 18 May 2022; Jalal Jahangir, 'Bangladesh's Fresh Start' (2009) 20 *Journal of Democracy* 41, 49.

³⁷ Bari, *States of Emergency* (n 2) 190.

³⁸ Carlotta Gall, 'Bhutto Announces Date of Return to Pakistan', *The New York Times* (Islamabad, 15 September 2007) <<https://www.nytimes.com/2007/09/11/world/asia/11pakistan.html>> accessed 5 December 2021; Carlotta Gall, 'Pakistan Edgy as Ex-Premier is Exiled Again', *The New York Times* (Islamabad, 11 September 2007), <<https://www.nytimes.com/2007/09/15/world/asia/15pakistan.html>> accessed 5 December 2021).

³⁹ Bari, *States of Emergency* (n 2) 189.

⁴⁰ Emergency Power Ordinance, 2007 (Bangladesh).

set by the previous four emergency regimes— each of which had suspended the enforcement of 12 of the 18 fundamental rights.⁴¹ Furthermore, the regime did not pay any heed to the fact that Bangladesh had in September 2000 acceded to ICCPR, which in turn imposed an obligation on the regime to refrain from suspending the non-derogable rights contained in ICCPR and suspend only those rights which had a direct bearing on the emergency.

Since the Constitution does not contain any mechanisms for ensuring the effective scrutiny of the measures taken by the executive during an emergency, the emergency regime proceeded to abuse many of the suspended rights with impunity. For instance, law enforcement agencies extrajudicially executed as many as 333 individuals⁴² and arrested an astounding 500,000 individuals during the continuation of the emergency.⁴³ Furthermore, the regime resorted to several methods of torture, such as electric shocks and insertion of ‘nails or needles under the fingernails or toenails or other sensitive parts of the body’, to coerce false confessions of guilt from political detainees in an effort to prevent them from contesting in the next general election.⁴⁴

It is therefore evident from the above discussion that the emergency of 2007 was declared and subsequently continued to realise the political aspiration of the army, which was the driving force behind the NPCG, of formally seizing power. However, the army could not ultimately fulfil its aspiration due to the unwillingness of the foreign dignitaries to support Bangladesh’s slide towards military dictatorship.⁴⁵ Consequently, the emergency and restrictions on the rights of individuals were lifted after almost 2 years of continuation on 17 December 2008.

21.5 Declarations of Martial Law in 1975 and 1982

Since Bangladesh’s emergence as an independent state, martial law has been declared twice, on 15 August 1975 and 24 March 1982.

⁴¹ Bari, *States of Emergency* (n 2) 200–207.

⁴² Odhikar, ‘Total Extra-Judicial Killings (Allegedly by Few Members of Different Agencies) from 2001–2021’ (June 2021) <http://odhikar.org/wp-content/uploads/2021/06/KLEA_2001-2021.pdf> accessed 9 December 2021.

⁴³ Asian Human Rights Commission, *The State of Human Rights in Bangladesh* (AHRC-SPR-008-2008, 2008) 23.

⁴⁴ Bari, *States of Emergency* (n 2) 212.

⁴⁵ International Crisis Group, *Restoring Democracy in Bangladesh* (Asia Report No. 151, 2008) 7.

21.5.1 *The Martial Law of 15 August 1975*

During 1974–75, the Sheikh Mujib government declared a state of emergency on the ground of internal disturbance and passed the Constitution (Fourth Amendment) Act 1975, which replaced the parliamentary form of government with a presidential one.⁴⁶ By virtue of the Fourth Amendment, Mujib entered upon the office of the President of Bangladesh⁴⁷ without the requirement of an election. He was further given the authority to exercise supremacy over Parliament and the Judiciary and to declare Bangladesh a one-party State.⁴⁸ Since the changes introduced by the Fourth Amendment made a peaceful and democratic transfer of power a well-nigh impossibility, Mujib was assassinated in a military *coup d'état* on 15 August 1975⁴⁹ and Bangladesh was subsequently placed under Martial Law.⁵⁰

Unlike the 1958 and 1969 Martial Law regimes of Pakistan, which had abrogated the 1956 and 1962 Constitutions of Pakistan respectively, the Martial Law regime of 1975 neither abrogated nor suspended the Constitution of Bangladesh in its entirety. Instead, the Constitution was made subservient to the first Proclamation, Martial Regulations and Orders,⁵¹ in contravention of Article 7 of the Constitution, which proclaims the Constitution to be the 'supreme law of the Republic' and any law inconsistent with the Constitution 'shall, to the extent of the inconsistency, be void'.

Since the Constitution of Bangladesh does not contain any provisions permitting the proclamation of martial law even for the necessity to restore law and order, the declaration of martial law in August 1975 was arguably an extraconstitutional act. There was no attempt on the part of the martial law regime to justify the declaration of martial law even under the common law doctrine of necessity by mentioning, for instance, in the preambular paragraph of the first Proclamation the compelling circumstances which led to such a declaration in August 1975. The absence of any reference to the circumstances which necessitated the declaration of martial law is due to the fact that the new regime promulgated martial law at a time when the nation was peaceful as it was already under a state of emergency declared on 28 December 1974. As martial law owes its very existence to the necessity to safeguard the life of the nation from grave threats, it can be strongly argued that declaration of martial law in August 1975 could not be justified under the doctrine of necessity either. Rather it was declared to obviate the possibility of any public opposition to the newly instituted regime's extra-constitutional act of toppling a democratically elected government.

⁴⁶ Constitution (Fourth Amendment) Act, 1975 (Bangladesh) s 4.

⁴⁷ Ibid s 35.

⁴⁸ Ibid. s 23.

⁴⁹ Bari, *States of Emergency* (n 2) 177.

⁵⁰ Proclamation of Martial Law, 1975, second preambular para.

⁵¹ Ibid., clause e.

After over 3 years of continuation, the martial law was revoked on 6 April 1979 by the newly elected Parliament.⁵² Subsequently, the Constitution (Fifth Amendment) Act 1979 was passed by Parliament to validate all the measures that had been taken by the Martial Law regime.

21.5.2 *The Martial Law of 24 March 1982*

Although Bangladesh returned to democratic rule following the revocation of martial law on 6 April 1979, such return was short-lived. For President Ziaur Rahman (Zia), who had ascended to the Presidency on 21 April 1977 during the first martial law, was assassinated by a group of army officers in an abortive coup.⁵³ Following the assassination of the President, Chief of Army Staff, General HM Ershad, categorically dismissed the possibility of the declaration of yet another martial law citing Pakistan's troubling experiences with 'one' martial law 'after another'.⁵⁴ He pledged his allegiance to the civilian administration headed by Acting President Abdus Sattar. However, Ershad had a radical change of heart within only a matter of few months. As he on 24 March 1982 overthrew the government of Sattar in a bloodless coup and placed the country under martial law.⁵⁵

In an attempt to justify this noticeable departure from earlier assurances, the Proclamation of Martial Law issued by Ershad stated that the imposition of martial law was necessitated, among other things, by the alarming deterioration of the 'law and order situation' which threatened 'peace, tranquillity, stability and life with dignity'.⁵⁶ However, the Proclamation was devoid of any reference to the actual circumstance which caused such deterioration of the law and order situation. Furthermore, there are reasons to doubt the regime's claim of a deterioration in the law and order situation. For from 30 May 1981 to 21 September 1981, the country was under a state of emergency to put down an armed rebellion, which, among other things, involved the assassination of Zia.⁵⁷ The proclamation of emergency, which was presented to Parliament for its approval only 40 days after invocation, was revoked after the threat posed to the security of the nation had been contained.⁵⁸

Later, in an interview, Ershad claimed that the objective of his martial law regime was to establish a 'healthy' democratic system which would 'ensure that power

⁵² M Ershadul Bari, 'Martial Law in Bangladesh, 1975–1979: A Legal Analysis' (PhD thesis, SOAS, University of London 1985) 141.

⁵³ 'Assassination of President Zia' (1981) 27 *Asian Recorder* 16,099, 16,099–16,100.

⁵⁴ 'Rioting Over Executions' (1981) 27 *Asian Recorder* 16,299, 16,299–16,300.

⁵⁵ Proclamation of Martial Law, 1982, fourth preambular paragraph.

⁵⁶ *Ibid*, first preambular paragraph.

⁵⁷ Bari, *States of Emergency* (n 2) 177–180.

⁵⁸ *ibid*.

really vests with the people'.⁵⁹ However, Ershad's idea of instituting a 'healthy democratic system' involved:

- (a) the suspension of the Constitution of Bangladesh notwithstanding the fact that the concept of democracy is woven into the very fabric of the Constitution as one its basic features.⁶⁰ This was a marked departure from the precedent set by the first martial law regime that subordinated the Constitution to the Martial Law Proclamation, Regulations and Orders. Furthermore, the Constitution, the supreme law of the land, does not permit its suspension under any circumstances.

The suspension of the Constitution meant that the 18 fundamental rights guaranteed by it also became inoperative. It is, indeed, difficult to envisage a democratic society in which individuals can be deprived of the enjoyment of the most basic rights.

- (b) assumption, in his capacity as the Chief Martial Law Administrator, of 'the entire executive and legislative authority'⁶¹ in violation of the doctrine of separation of powers.
- (c) ascension to the office of the President on 11 December 1983 by means of a Proclamation.⁶²
- (d) formation of his own political party, the Jatiya Party (JP), and the subsequent supervision in May 1986 of a sham parliamentary election in which the JP had won 153 out of the 300 parliamentary seats.⁶³

Ershad finally revoked the martial law and restored the Constitution on 11 November 1986. On the day same, he used the majority of his Party in Parliament to get the Constitution (Seventh Amendment) Act 1986 passed, which validated all the actions that had been taken by his extra-constitutional regime during the continuance of martial law.⁶⁴ Thus, it is manifestly evident from the discussion above that the second martial law was declared in Bangladesh not to preserve the sanctity of the constitutional order but to keep it in abeyance to suit Ershad's objective of capturing power.

⁵⁹ 'Designation as Prime Minister' (1982) 28 *Asian Recorder* 16,937; 'Gen. Ershad Takes Over' (1982) 28 *Asian Recorder* 16,575, 16,575–77.

⁶⁰ *M Saleem Ullah v. Bangladesh*, (2005) 57 DLR (HCD) 171, 181.

⁶¹ Proclamation (First Amendment) Order I of 1982.

⁶² The Proclamation Order No. III of 1983.

⁶³ Ali Riaz, 'Bangladesh' in Neil DeVotta (ed), *An Introduction to South Asian Politics* (Routledge 2015) 79.

⁶⁴ Richard M Weintraub, 'Martial Law Ends in Bangladesh' *The Washington Post* (Washington, 11 November 1986), <<https://www.washingtonpost.com/archive/politics/1986/11/11/martial-law-ends-in-bangladesh/2be0301b-5fc2-4e63-93d8-ff368b939a3b/>> accessed 9 December 2021.

21.6 Judicial Response to the Declarations of Martial Law and Proclamations of Emergency

During the continuance of the two declarations of Martial Law in Bangladesh, the constitutionality of such declarations was never challenged before the Supreme Court (SC), the nation's highest court of law. Perhaps, the ouster of the court's jurisdiction by the Proclamations of Martial Law of 1975 and 1982 to 'call in question in any manner whatsoever' or 'declare illegal or void' the declarations of martial law⁶⁵ dissuaded individuals from challenging such declarations. Furthermore, the hostile environment in which judges were compelled to discharge their duties during the martial law regimes⁶⁶ may have impeded their independence to observe in any case before them that their inherent constitutional power of judicial review⁶⁷ could not be curtailed even by a martial law proclamation.

However, on 1 February 2010, in *Khondker Delwar Hossain v. Bangladesh Italian Marble Works Ltd., and others*⁶⁸ (the Fifth Amendment Case), the Appellate Division (AD), the higher division of the SC, in upholding a decision of the HCD, the lower division of the SC, observed that since the concept of martial law was alien to the Constitution, the declaration of martial law in 1975 and the subsequent issuance of Martial Law Proclamations, Regulations and Orders which, among other things, curbed the supremacy of the Constitution in contravention of Article 7 of the Constitution, was 'illegal, void and non-est in the eye of law' and as such, it was beyond the powers of Parliament to validate such actions through the enactment of the Fifth Amendment.⁶⁹

In light of the above precedent, the HCD on 26 August 2010, only 8 months and 25 days after the delivery of AD's judgment in the Fifth Amendment Case, declared the Proclamation of Martial Law in 1982 and the enactment of the Seventh Amendment unconstitutional.⁷⁰

Although the SC has declared both the proclamations of martial law unconstitutional, it has not yet examined whether any of the five proclamations of emergency issued in pursuance of Part IXA of the Constitution were without jurisdiction or *mala fide*. However, in July 2008, the constitutionality of the fifth proclamation of emergency, which was invoked on 11 January 2007 on the ground of internal

⁶⁵ Proclamation of Martial Law, 1975, clause g; Proclamation of Martial Law, 1982 (Bangladesh), clause h.

⁶⁶ See M Ehteshamul Bari, *The Independence of the Judiciary in Bangladesh: Exploring the Gap between Theory and Practice* (Springer 2022) 133–134.

⁶⁷ Constitution of Bangladesh, 1972, art 102(2); *Abdul Latif Mirza v Government of Bangladesh*, (1979) 31 DLR (AD) 1, 9–10.

⁶⁸ *Khondker Delwar Hossain v. Bangladesh Italian Marble Works Ltd., Dhaka and others*, Civil Petition for Leave to Appeal Nos 1044 and 1045 (2009).

⁶⁹ *ibid.* 156.

⁷⁰ *Siddique Ahmed v Bangladesh*, (2010) Writ Petition No. 696, 125.

disturbance, was challenged in *M Saleem Ullah and Others v Bangladesh*.⁷¹ The HCD even issued a *rule nisi* asking the emergency regime to explain why the said emergency should not be declared illegal. But before the HCD could determine the merits of the challenge, the emergency was revoked, thereby rendering the case infructuous.

21.7 The Changes Introduced to the Constitution in 2011 to Obviate the Possibility of Subversion of the Constitution

In delivering its judgment in the Seventh Amendment Case, the HCD recommended the enactment of a law stipulating suitable punishment for those who seek to seize power unlawfully.⁷² Consequently, the current government of BAL used its overwhelming majority in Parliament on 3 July 2011 to pass the *Constitution (Fifteenth Amendment) Act 2011* (s 7), which inserted a new Article 7A in the Constitution of Bangladesh. Article 7A of the Constitution, in the same manner as Article 6 of the Constitution of Pakistan 1973, provides that any effort to abrogate, repeal or suspend the Constitution by use of force or any other unconstitutional means would constitute sedition. Thus, it is evident that this provision has been inserted in the Constitution to obviate the possibility of the subversion of the Constitution due to Army adventurism.

21.8 Conclusion

The foregoing discussion reveals that the constitutional provisions concerning emergency and the extraconstitutional declarations of martial law in Bangladesh have served as a means of subverting the rule of law and depriving citizens of their fundamental rights. Although the Fifteenth Amendment has sought to obviate the possibility of military adventurism, no meaningful safeguards have yet been incorporated into the Constitution for limiting the possibility of abuse of the constitutional provisions concerning emergency powers. Accordingly, the following safeguards should be inserted in the Constitution:

- (a) Since all the five proclamations of emergency have been invoked on the imprecise ground of internal disturbance, this ground should be replaced with 'armed rebellion' as has been done in India in 1978. For unlike 'internal disturbance',

⁷¹ Writ Petition No. 5033 of 2008.

⁷² *Siddique Ahmed v Bangladesh* (n 72) 132.

the ground of ‘armed rebellion’ has a precise meaning and as such, cannot be misused by the executive to resort to emergencies for extraneous purposes.

- (b) The absence of a reliable system of checks and balances under the emergency framework of the Constitution has time and again permitted the executive to use emergencies as a vehicle for consolidating power by staging a crackdown against opponents. To obviate such a disturbing possibility, the Constitution should be amended to stipulate, in the same manner as the Constitution of South Africa 1996, that a proclamation of emergency should be amenable to review by increasing supermajorities of Parliament. The insertion of these safeguards will ensure that emergencies are not invoked and continued indefinitely for political purposes.
- (c) As citizens of the country have been deprived of the enjoyment of all or majority of their fundamental rights during the five proclamations of emergency, Article 141C(1) should be amended to incorporate the principles of non-derogation and proportionality as formulated by ICCPR. The incorporation of these two principles coupled with the safeguards discussed above will limit the possibility of imposing unwarranted restrictions on the rights of individuals under the guise of emergencies.

References

Books

- Ackerman, Bruce. 2006. *Before the Next Attack: Preserving Civil Liberties in an Age Terrorism*. New Haven: Yale University Press.
- Ahmed, Moudud. 1984. *Bangladesh: Era of Sheikh Mujibur Rahman*. Dhaka: University Press Limited.
- Bari, M. Ehteshamul. 2017. *States of Emergency and the Law: The Experience of Bangladesh*. London/New York: Routledge.
- . 2022. *The Independence of the Judiciary in Bangladesh: Exploring the Gap between Theory and Practice*. Singapore: Springer.
- International Commission of Jurists. 1983. *States of Emergency: Their impact on Human Rights*. Geneva: International Commission of Jurists.
- Wiener, F.B. 1940. *A Practical Manual of Martial Law*. Harrisburg: Military Service Publishing Co.

Chapters in Edited Book

- Riaz, Ali. 2015. Bangladesh. In *An Introduction to South Asian Politics*, ed. Neil DeVotta. London: Routledge. Chapter 4.

Articles

- Ackerman, Bruce, ‘The Emergency Constitution’ (2003–2004) 113 Yale Law Journal 1029.
- Brookfield, F.M. 1988. The Fiji Revolutions of 1987. *New Zealand Law Journal* 3: 250–251.

- Hasan, K. Sarwar. 1962. *The New Constitution of Pakistan*, *Parliamentary Affairs* 16 (2): 174.
- Jahangir, Jalal. 2009. Bangladesh's Fresh Start. *Journal of Democracy* 20: 41.
- Kaushik, Susheela. 1963. Constitution of Pakistan at Work. *Asian Survey* 3 (8): 384.
- Scheuerman, William. 2006. Emergency Powers and the Rule of Law After 9/11. *The Journal of Political Philosophy* 14, 61 (1): –84.
- Williams, George. 2001. The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji. *Oxford University Commonwealth Law Journal* 1 (1): 73.

Thesis

- M. Ershadul Bari, 'Martial Law in Bangladesh, 1975–1979: A Legal Analysis.' (PhD thesis, SOAS, University of London 1985).

Documents

- Asian Human Rights Commission, *The State of Human Rights in Bangladesh* (AHRC-SPR-008-2008, 2008) 23.
- International Crisis Group, *Restoring Democracy in Bangladesh* (Asia Report No. 151, 2008).
- Odhikar, 'Total Extra-Judicial Killings (Allegedly by Few Members of Different Agencies) from 2001–2021' (June 2021). http://odhikar.org/wp-content/uploads/2021/06/KLEA_2001-2021.pdf. Accessed 9 Dec 2021.

Internet Sources

- 'Bangladesh Power Shift Postponed. 2006. *BBC* (London, October 28). http://news.bbc.co.uk/2/hi/south_asia/6093300.stm. Accessed 11 April 2022.
- 'CA Vows to Transfer Power Through Polls at Earliest, EC to be Reconstituted, Flawless Electoral Roll to be Prepared. 2007. *The Daily Star* (Dhaka, January 22) 1. <http://archive.thedailystar.net/2007/01/22/d7012201011.htm>. Accessed 18 May 2022.
- Gall, Carlotta. 2007a. Bhutto Announces Date of Return to Pakistan. *The New York Times* (Islamabad, September 15). <https://www.nytimes.com/2007/09/11/world/asia/11pakistan.html>. Accessed 5 Dec 2021.
- Gall, Carlotta. 2007b. Pakistan Edgy as Ex-Premier is Exiled Again. *The New York Times* (Islamabad, September 11). <https://www.nytimes.com/2007/09/15/world/asia/15pakistan.html>. Accessed 5 December 2021.
- Khalil, Tasneem. 2006. Dhaka Tries to Fill Power Vacuum. *CNN* (Dhaka, October 29). <https://edition.cnn.com/2006/WORLD/asiapcf/10/29/bangladesh/>. Accessed 10 Apr 2022.
- Liton, Shakhawat. 2006. President sworn in as Chief of Caretaker Govt. *The Daily Star* (Dhaka, October 30). <http://archive.thedailystar.net/2006/10/30/d6103001011.htm>. Accessed 10 Apr 2022.
- 'Malaysia Invokes Emergency to Stop By-Elections as COVID-19 Cases Rise. 2020. *Reuters* (Kuala Lumpur, December 16). <https://www.usnews.com/news/world/articles/2020-12-16/malaysia-invokes-emergency-to-stop-by-elections-as-covid-19-cases-rise>. Accessed 20 December 2021.
- Ratcliffe, Rebecca. 2021. Malaysia Declares Covid State of Emergency Amid Political Turmoil. *The Guardian* (Bangkok, January 12). <https://www.theguardian.com/world/2021/jan/12/malaysia-declares-covid-state-of-emergency-amid-political-turmoil>. Accessed 20 Dec 2021.
- Weintraub, Richard M. 1986. Martial Law Ends in Bangladesh. *The Washington Post* (Washington, 11 November 1986). <https://www.washingtonpost.com/archive/politics/1986/11/11/martial-law-ends-in-bangladesh/2be0301b-5fc2-4e63-93d8-ff368b939a3b/>. Accessed 9 Dec 2021.

M Ehteshamul Bari PhD is a Senior Lecturer in Law and the Deputy Head (Research) of the Thomas More Law School at the Australian Catholic University, Melbourne, Australia. His primary research expertise lies in the areas of constitutional law, human rights law, Asian law, and public international law. He is the author of three monographs, namely, *States of Emergency and the Law: The Experience of Bangladesh* (Routledge, 2017), *The Use of Preventive Detention Laws in Malaysia: A Case for Reform* (Springer, 2020), and *The Independence of the Judiciary of Bangladesh: Exploring the Gap between Theory and Practice* (Springer, 2021). He has also published many research articles in reputed peer-reviewed journals, including the Oxford University Commonwealth Law Journal, Wisconsin International Law Journal, George Washington International Law Review, Emory International Law Review, Cardozo International and Comparative Law Review, Transnational Law and Contemporary Problems, Michigan State International Law Review, Suffolk Transnational Law Review, San Diego International Law Journal and Commonwealth Law Bulletin. He has received prestigious research awards, including the Executive Dean's Higher Degree Research Award for Best Publication (Macquarie University) in recognition of his scholarship.

Chapter 22

Judicial Lawmaking in Bangladesh: Looking Back and Into the Future



Md Rizwanul Islam

Abstract The line between interpreting and making the law by the judiciary is often a controversial one. While the former would, in one way or the other, often transform into the latter, reasonable minds can differ when such an exercise is indispensable or otherwise. Taking a functional approach, this chapter critically engages with the reported cases of the Supreme Court of Bangladesh (SCB). It demonstrates that the judicial lawmaking by the SCB has been a mixed experience in Bangladesh. The chapter also surmises what the past may talk about the future impact of the jurisprudence developed by the SCB since the emergence of Bangladesh.

Keywords Bangladesh · Lawmaking · Judicial lawmaking · Supreme court · Law reform

22.1 Introduction

While Justice John Roberts in his congressional hearing for appointment to the US Supreme Court has merely referred to his judicial role as that of a baseball umpire calling balls and strikes, he must have been aware that he was downplaying his role as a future Justice of a constitutional court.¹ In theory, the doctrine of *stare decisis*

The author gratefully acknowledges the able research assistance of Sajid Hossain, Rakibul Islam Bhuiyan, and Shahriar that has helped him substantially. He also thanks Nafiz Ahmed for his comments on a draft version of the chapter.

¹ 109 Congress, 1st Session 56, 12 September 2005. In a very highly politically charged context, the rationale of his choice is not difficult to appreciate.

Md R. Islam (✉)
Department of Law, North South University, Dhaka, Bangladesh
e-mail: rizwanul.islam@northsouth.edu

‘permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.’² Thus, it would appear that the Parliament and in some cases, the executive in the collective wisdom of the group would make the law and the judiciary would interpret the law so made to apply it to the facts of individual cases. The line between making the law and interpreting it is theoretically somewhat delineated, but in practice, it can be a highly debated matter. At a bare minimum, it is a common ground in the common law system that by interpreting the *lex lata* the judges may create the law. An eloquent expression of the need for the constraints and four corners of judicial lawmaking has been proffered by Justice Cardozo in the following words:

He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy disciplined by system, and subordinated to ‘the primordial necessity of Order in the social life’. Wide enough in all conscience is the field of discretion that remains.³

A judge unwilling to venture into the terrains purely reserved to the parliamentary or executive lawmaking may, of course, employ certain evasive tools. For instance, she/he may decline to give decisions on questions which are deemed as political.⁴ How the constitutional courts employ different techniques of interpretation to arrive at a conclusion in constitutional cases is well covered in the literature.⁵ Within the limited breadth of this chapter, it would not venture into that terrain, it rather employs a functional approach and critically engages with the precedents. This chapter finds that the SCB’s lawmaking venture has often followed precedents of other countries (particularly, though not exclusively those of, its neighbouring

² *Vasquez v Hillery* (1986) 474 US 254, 265–66.

³ Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921) 141.

⁴ *Luther v Borden* (1849) 48 US (7 How) 1, 46–47. In *Abdul Mannan Bhuiya and Ors v The State and Others* (2008) 28 BLD (AD) 55, [45], the Bangladesh apex court observed that ‘[t]he virtue and vices of *hartal* is a political question and this court in exercise of its judicial self restraint declines to enter into such political thicket particularly in absence of any Constitutional imperative or compulsion.’

⁵ For discussions on originalist approach of constitutional interpretation, see Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1; Raoul Berger, ‘Originalist Theories of Constitutional Interpretation’ (1988) 73 *Cornell Law Review* 350. For a discussion on constructive interpretation, see Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) Chapter 7; Raoul Berger, ‘Ronald Dworkin’s The Moral Reading of the Constitution: A Critique’ (1997) 72 *Indiana Law Journal* 1099. For a general discussion on interpretive methods, see William Baude and Stephen E Sachs, ‘The Law of Interpretation’ (2017) 130 *Harvard Law Review* 1079, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson 2012).

countries)⁶ or international law.⁷ This appears to be a part of a global phenomenon where the constitutional courts have been more cosmopolitan or internationalist.⁸

This chapter analyses four strings of cases. The first string of cases is those where the SCB has refrained from venturing into the judicial lawmaking. The second line includes cases where the SCB has assumed the role of lawmaking when there has not been any apparent textual authority for taking that route. In the third string of cases the judge has through its interpretative venture ended up creating new law. The fourth string covers cases where instead of creating law, the SCB has proposed that the Parliament pass law. This chapter, though not exhaustive, sufficiently encapsulates the trends in Bangladesh. It argues that within the constraints of outright martial law and fledgling democracy,⁹ the SCB has generally treaded a fine line. It projects that to what extent the SCB may assume a more assertive lawmaking role will depend on the trajectory of democracy in Bangladesh.

22.2 The SCB Staying Off Judicial Lawmaking

This part analyses cases where petitioners have sought certain remedies from the SCB, which if upheld by the Court could amount to lawmaking and the SCB staved off that terrain. A leading case epitomising this pattern is *Abdul Mannan Bhuiyan and another v State*.¹⁰ In this case, based on a newspaper report, the High Court Division (HCD) of the SCB issued a *suo motu* rule invoking Section 561A of the *Code of Criminal Procedure*, 1898 (CrPC) upon, inter alia, the political leaders and Secretary, Ministry of Home Affairs to explain why pro-*hartal* (strike) and anti-*hartal* activities would not be declared as cognizable offences. The HCD held that every assembly of five or more persons either to support or cease a *hartal* would be

⁶For example, *Abdul Momen Chowdhury and others v Bangladesh and others* (2014) 66 DLR (HCD) 9 [9–10], *Secretary, Ministry of Finance, Government of Bangladesh v Md. Masdar Hossain & others* (2000) 20 BLD (AD) 104 [70]. This is in keeping with the general trend of constitutional review cases of Bangladesh, see Md. Rizwanul Islam, ‘Reasonableness as Proportionality: More Intrusive Scrutiny in Civil-Political Matters than Socio-Economic Ones?’ in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press 2020) 228–29.

⁷For example, *Rabiya Bhuiyan, MP v Ministry of Local Government and Rural Development and ors*, (2007) 27 BLD (AD) 261.

⁸Jason Chandler, ‘Foreign Law – a Friend of the Court: An Argument for Prudent Use of International Law in Domestic, Human Rights related Constitutional Decisions’ (2011) 34 *Suffolk Transnational Law Review* 117; Richard A Posner, *How Judges Think* (Harvard University Press, 2008) 369–77; Jeremy Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 119 *Harvard Law Review* 129; Ken I Kersch, ‘The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law’ (2005), 4 *Washington University Global Studies Law Review* 345; Roger P Alford, ‘In Search of a Theory for Constitutional Comparativism’ (2005) 52 *UCLA Law Review* 639.

⁹For a scholarly discussion on the executive-judiciary relation in Bangladesh, see Nizam Ahmed, ‘Executive Judiciary Relations in Bangladesh’ (2006) 33(2) *Asian Affairs* 103.

¹⁰Bhuiya (n 4).

an unlawful assembly within the purview of Section 141 of the *Penal Code*, 1860 and thus, a punishable offence. It also held that the activities of the members of such an unlawful assembly would be cognisable offences under various Sections of Part VIII of the *Penal Code* depending on their actual action/s of the respective persons.

On appeal, the Attorney General made a cogent point that since there was no pending judicial proceeding that would trigger the exercise of the inherent powers of the HCD, hence, there was no legal scope for the HCD to apply it.¹¹ The Appellate Division (AD) of the SCB accepted this argument. The AD arrived at this conclusion on the basis of the finding that the word 'or' in Section 561A of the CrPC is conjunctive.¹² Referring to the decision of the US Supreme Court in *Myers v United States*,¹³ the AD observed that the *raison d'être* of the separation of powers among the organs of the government is not greater efficiency, but the curtailment of arbitrary power by ensuring checks and balances. It concluded that like other organs of the government it also needs to resort to self-restraint and observed:

It is true that there is no such thing as absolute or unqualified separation of power in the sense conceived by Montesquieu, but there is however, a well marked and clear-cut functional division in the business of the Government, and our judiciary is to oversee and protect the overstepping not only of other organs of the Government but also of itself... offence can be created only by a law, by an act of the Parliament and not by any legal pronouncement by any court. In the premises aforesaid the High Court Division acted beyond its authority in entering into the field of making law and to declare the pro-hartal and anti-hartal activities as cognizable offence.¹⁴

In *Shah Abdul Hannan and others v Bangladesh*,¹⁵ the petitioners alleged that production sharing contracts (PSCs) in exploring gas and other mineral resources in Bangladesh were not protecting national interests. In particular, the contracts the national authorities signed with foreign companies did not ensure that Bangladesh received a fair share as per the standard international practice. The petitioners applied to the HCD to order the government to craft a national strategy policy through the Parliament which would protect the national interest. The HCD balked. It observed that any matter of executive policy making conferred by the *Constitution* vested in the executive, would not be amenable to judicial intervention unless there are some exceptional circumstances. Such circumstances may be present if the policy making process is tainted by arbitrariness, capriciousness, whimsicalness, bad faith, mala fide, procedural impropriety, or violation of any statutory or constitutional provision or any fundamental right.¹⁶

The HCD reasoned that a deferential restraint by the Court is warranted in this arena because '[i]t is impossible ... to meticulously arrive at a decision on the merit of a Policy: the judges are simply not equipped enough to shoulder this task without

¹¹ *ibid.* [19].

¹² *ibid.* [21].

¹³ (1926) 272 US 52.

¹⁴ Bhuiya (n 4) [41–44].

¹⁵ (2011) 16 BLC (HCD) 386.

¹⁶ *ibid.* [68–69].

taking evidence from those who have the expertise or qualification.’¹⁷ And unlike a trial, in a judicial review case, detailed evidence taking is not possible.¹⁸ The Court took note of the landmark decision in *Masdar*, but said that is an exceptional case and it had no authority to ‘dictate the legislators as to their role qua legislators. They are only accountable to their over lords, the electors.’¹⁹ The HCD observed that its authority in constitutional review cases, ‘to set aside a legislation in an appropriate cases [sic] is one thing, while dictating Parliament to legislate in a manner to suit our wishes, is quite another.’²⁰ The Court was mindful that it could not abdicate its judicial review function as the bastion of the *Constitution* but it reserved that function in assessing the propriety of the governmental policy making when that is tainted by any of the aforementioned vices,²¹ beyond that, it did not see its role in the law or policymaking.

22.3 Judicial Law Making with Little or No Direct Textual Basis

In *Bangladesh v Idrisur Rahman*, there was a challenge regarding the legality of non-confirmation of appointment of some of the Additional Judges to the HCD. It was alleged that the non-confirmation despite a positive recommendation by the Chief Justice (CJ) was unconstitutional. The relevant provision of the *Constitution* as contained in Article 95(1) provides that ‘Judges shall be appointed by the President after consultation with the Chief Justice.’ Thus, on a literal reading, it would not appear that the wording envisaged that the final decision of the President in appointing the Judges needed to follow the recommendation of the CJ. However, the AD read that provision to indicate that the recommendation of the CJ is authoritative. The AD reasoned that this nature of the recommendation is based on continuous practice. It observed that ‘[t]he convention of consultation with the Chief Justice in the matter of appointment of Judges under Articles 95 and 98 of the Constitution has hardened and matured into a Rule of Law having been recognized and acted upon by all the “actors” in the matter and therefore is binding upon the executive.’²²

If there was no apparent textual authority to incorporate the practice as a law in *Idrisur*, the lack of authority is more striking in *Professor Syed Ali Naki and Ors. v Bangladesh and Ors.*²³ This case involved a dispute regarding the management of the board of trustees of a private university, but rather intriguingly, it also ended up

¹⁷ *ibid.* [69].

¹⁸ *ibid.*

¹⁹ *ibid.* [84].

²⁰ *ibid.*

²¹ *ibid.* [85].

²² *Bangladesh and Ors v Md. Idrisur Rahman and Ors* (2009) 29 BLD (AD) 79 [260].

²³ (2016) 36 BLD (HCD) 417.

in the setting up of a *de facto law*. The basic issue was competing claims about the management of Darul Ihsan University (DIHU). However, in one of the 13 writ petitions – Petition No. 10398 of 2013 – some LL.B. (Honours) degree holders from DIHU challenged the legality of barring them from sitting for the examination for enrolment as advocates which is administered by the Bangladesh Bar Council (BBC). In settling this issue, the HCD went on to observe, *inter alia*, that '[n]o private university shall be permitted to admit more than 100 (one hundred) students in a calendar year. Also, the BBC itself shall monitor the admission process of the LLB (Honours) course in the private universities.'²⁴ It also made other lengthy observations about the admission requirements of the LLB (Honours) programmes and other matters of academic management pertaining to the Law Departments of Bangladeshi private universities.²⁵ Indeed, it could be argued that the observations of the HCD should have been limited to the matter at issue, particularly the eligibility of the DIHU graduates to sit for the enrolment examinations. The question of admission into their LLB programme was more of an academic discussion which was a dispensable exercise. Indeed, they do not sit well with the following pronouncement of the AD that:

The High Court Division while exercising its jurisdiction under Article 102 or under any other Article like Article 108 of the Constitution should not enter into academic discussion and will not pass upon a constitutional question unless a decision upon that very point becomes necessary to the determination of the cause and will not go out of their way to find such topics.²⁶

It would be submitted that while the Legal Education Committee of the BBC has a statutory role in regulating entry into the professional practice of law, the judgment did not contain any cogent nexus to the relevant statutory provisions. Article 10(i) of the *Bangladesh Legal Practitioners and Bar Council Order, 1972* has vested in the BBC the functions to take measures to 'promote legal education and to lay down the standards to such education *in consultation with the universities in Bangladesh* imparting such education' (emphasis added). It appears that while vesting the regulatory role in the BBC, the Parliament did not envisage the BBC to possess the sole regulatory role in the realm of legal education.²⁷ And in this case, it was the HCD or (upon appeal, the AD) which was regulating, not the BBC. The HCD also observed that '[t]he Legal Education Committee [of the BBC] shall always be headed by an Hon'ble Judge of the Supreme Court of Bangladesh in addition to having two other Hon'ble Judges of the Supreme Court as the members of the said Committee.'²⁸ On appeal, the AD castigated the HCD for passing an order on private universities as no other private university apart from DIHU were a party to the

²⁴ *ibid.* [130].

²⁵ *ibid.* [154].

²⁶ Rahman (n 22) [260].

²⁷ Md. Rizwanul Islam, 'Dissecting Quasi-Legislative Judicial Directives of the Supreme Court of Bangladesh' in Po Jen Yap (ed), *Constitutional Remedies in Asia* (Routledge 2019) 146.

²⁸ *Professor Syed Ali Naki and Ors v Bangladesh and Ors* (2016) 36 BLD (HCD) 417 [132].

dispute and they were not in consonance with the law.²⁹ But the AD also issued some directives, stating inter alia that '[n]o private university shall issue Bachelor of Law degree unless such person undergoes 4 years education in law course and this direction shall have prospective effect.³⁰ No public or private university shall admit students in bachelor of law course more than 50 (fifty) students in a semester'.³¹ However, on what estimation, the AD arrived at this definitive number to be uniformly applicable to all public and private universities in Bangladesh, it left everyone clueless.³² It would also appear both the AD and HCD viewed the issue of admission into the LLB programme, and its successful completion would automatically lead to the application for practising as a lawyer. However, not all people with an LLB (Honours) degree opt for practising law as a member of the Bar. The relevant statute governing the private universities in Bangladesh, i.e., the *Private University Act*, 2010 also does not seem to foresee any such cap on the admission to be fixed by anyone outside the University.

In *BNWLA v Bangladesh*, the petitioner claimed that due to the dearth of any appropriate law in place, girls and ladies face sexual harassment in educational institutions and workplaces.³³ The petitioner applied for the court to issue an order directing the government to adopt guidelines, policies, or laws to remedy this unfortunate situation. Interestingly, government lawyers did not oppose the claims. The HCD upheld the petitioner's claim and observed that there was an absence of adequate legal provisions to protect girls and ladies. Intriguingly, while the Court found that the existing legal provisions were inadequate, there was not enough analysis on why the existing provisions of the *Penal Code* or other penal laws of Bangladesh could not suffice to provide adequate relief for the incidents that found their places in the judgment.³⁴ It is noticeable that in deciding the case, the HCD referred to the decision of *Vishaka and Others v State of Rajasthan*,³⁵ and observed that the Indian Supreme Court formulated guidelines for safeguarding women at their workplaces by defining what would connote sexual harassment and also by formulating the procedure for redress.³⁶ Another feature of the judgment is extensive observations which are more

²⁹ *Bangladesh Bar Council v AKM Fazlul Kamir* (2017) 14 ADC 271 [61].

³⁰ *ibid.* [101].

³¹ *ibid.*

³² *ibid.*

³³ (2009) 29 BLD (HCD) 415 [Hereinafter BNWLA (Bangladesh National Women Lawyers' Association)]. For the same trend, see *Bangladesh Legal Aid and Services Trust and another v Secretary, Ministry of Education, Bangladesh and others*, (2011) 63 DLR (HCD) 643 [43] where the HCD observed that 'there should be separate law to regulate the conduct/mis-conduct of teachers in the private educational institutions.' See also, *BNWLA v The Cabinet Division* (2012) 17 MLR (HCD) 121 directing the Parliament to prohibit employment of children up to age 12 years so that they can have a proper education.

³⁴ BNWLA (n 33) [51]; Md. Rizwanul Islam, Oxford International Law in Domestic Courts Series, ILDC 3088 (BD 2009).

³⁵ AIR 1997 SC 3011.

³⁶ BNWLA (n 33) [45].

akin to academic commentary or research report than judgment. For instance, their Lordships observed, that there should be ‘awareness of the rights of female students and employees guaranteed and conferred by the Constitution and the statutes should be created by notifying in simple words the relevant provisions of the Constitution and the statutes’.³⁷ It is unclear how the observance or otherwise of these broad directives can be assessed by the HCD with any degree of certainty.³⁸

In *Abdul Momen Chowdhury*, the petitioners applied that the HCD direct the Election Commission to include certain particulars of the candidates (their academic background, criminal record, professions, source of income, particulars of loan taken from any bank or financial institutions, etc.) for the Member of Parliament position so that the voters could make a more informed choice. In this case too, no party objected the petition.³⁹ Relying on Article 119 of the *Constitution*, the HCD held that the Election Commission possessed a plenary power of regulating the preparation of the electoral rolls for elections and therefore, it must retain all powers necessary to attain its function there unless such exercise of power is curtailed by any express legal provision.⁴⁰ It observed that ‘both from Article 66 of the *Constitution* and also from *People’s Representation Order*, 1972 that there is no provision covering the matters sought for in this case. Since law is silent on this matter there is no difficulty on the part of this Court to provide for proper guideline.’⁴¹ Thus, it seems that the HCD felt that as long as there was no primary or delegated law directly contradicting what it was instructing the Election Commission to follow, its exercise was well within its powers and could operate as *de facto law*. Although, the direction was passed to the Election Commission, not the Parliament, the Election Commission could only implement them by making necessary changes to the electoral rules and hence, it qualifies as judicial lawmaking.

It is submitted that the propensity of judicial lawmaking in Bangladesh has at times encouraged petitions submitted to the SCB, which would be better left to the terrain of parliamentary lawmaking or executive policymaking.⁴² Even the SC is not oblivious to the challenges posed as it has cautioned that ‘[t]he Court is under an obligation to guard that the filing of a public interest litigation (PIL) does not convert into a publicity interest litigation or private interest litigation’.⁴³ In denouncing frivolous public interest litigation (PILs), it also observed rather deferentially to the

³⁷ *ibid.* [53].

³⁸ Islam (n 34).

³⁹ Chowdhury (n 6) [2].

⁴⁰ *ibid.* [8].

⁴¹ *ibid.* [9].

⁴² Md. Rizwanul Islam, ‘Judges as Legislators: Benevolent Exercise of Powers by the Higher Judiciary in Bangladesh with Not So Benevolent Consequences’ (2016) 16 (2) *Oxford University Commonwealth Law Journal* 219.

⁴³ *National Board of Revenue v Abu Saeed Khan and Others* (2013) 18 BLC (AD) 116 [38]. For a commentary on this, see Md. Rizwanul Islam and Md. Tayeb-Ul-Islam Showrov, ‘Sifting through the Maze of “Person Aggrieved” in Constitutional Public Interest Litigation: Has Abu Saeed Case Ushered a New Dawn?’ (2017) 28 *Dhaka University Law Journal* 155.

Parliament and executive that ‘the Court has no power to entertain a petition which trespasses into the areas which are reserved to the executive and legislative by the Constitution.’⁴⁴ The practice of filing too many dispensable PILs would be good for lawyers but it can be a challenge in a state like Bangladesh where there is a substantial backlog of pending cases before the courts. It may also stir up avoidable friction between the executive and the SCB.

22.4 Judicial Lawmaking While Interpreting

The SCB has in some cases resorted to the interpretation of various fundamental provisions enshrined in the *Constitution* and in that interpretative venture, has arguably created law. In the landmark decision in *Masdar*, one of the contentions of the government was that the SCB could not direct the Parliament to adopt legislative measures or direct the President to frame rules under the proviso to Article 133 of the *Constitution*.⁴⁵ The AD rejected the contention. It reasoned that as the Parliament and the executive betrayed the constitutional scheme by not acting as required by the *Constitution*, the SCB could intervene. It observed that:

[I]n the present case [there is a] constitutional deviation and constitutional arrangements have been interfered with and altered both by the Parliament by enacting the Act and by the Government by issuing various orders in respect of the judicial service. For long 28 years after liberation sub-paragraph (6) of paragraph 6 of the Fourth Schedule to the Constitution remains unimplemented. When Parliament and the executive, instead of implementing the provisions of Chapter II of Part VI follow a different course not sanctioned by the Constitution, the higher judiciary is within its jurisdiction to bring back the Parliament and the executive from constitutional derailment and give necessary directions to follow the constitutional course. ...We do not see why the High Court Division or this Court cannot repeat that exercise when a constitutional deviation is detected and when there is a constitutional mandate to implement certain provisions of the Constitution.⁴⁶

In *Bangladesh v Professor Nurul Islam*,⁴⁷ the petitioner sought directions from the HCD that the government enforce Sect. 22.3 of the *Tamakjato Shamogri Biponon Niontroner Jonno Pronito Ain* 1988 properly and to direct it to enact a law in the light of the Ordinance No. 16 of 1990 for banning the advertisements of tobacco products. The HCD upheld the claim and ordered, inter alia, the government ‘[t]o prohibit importation of cigarette or tobacco related product within a reasonable period and meanwhile to impose heavy tax for the import and to print the statutory

⁴⁴ *ibid.*

⁴⁵ *Masdar* (n 6). Before the HCD, this point does not seem to have been argued by the government side as no such point can be gleaned from the decision, see *Md. Masdar Hossain and 440 others v Bangladesh and others* (1998) 18 BLD (HCD) 558.

⁴⁶ *ibid.*

⁴⁷ (2016) 68 DLR (AD) 378.

warning legibly in bold words in Bengali.’⁴⁸ On appeal, the government argued, inter alia, that the SCB could not direct the Parliament to create a law unless in the first place, there was a law that violated a fundamental right.⁴⁹ Rejecting the argument, the AD held that ‘[w]hen the right to life of the people is at stake, the legislature is under the obligation to enact law to protect such right as per directives of the Court. As such the question of encroaching upon the domain of the legislature by the Court does not arise.’⁵⁰

22.5 The SCB as a Proposer of Lawmaking or Law Reform

In this line of cases, the SCB, instead of issuing any directive with the force of law, has observed (either as *ratio decidendi* or *obiter dicta*) that the Parliament should enact new laws or insert new provision/s or modify existing laws. For instance, in a recent case, the HCD has advocated for the introduction of ecocide in Sect. 22.3 of the *International Crimes (Tribunal) Act, 1973*.⁵¹ The Court based its observation in recognition of a global academic and civil society movement on incorporating ecocide as a crime under international criminal law.⁵² The observation of the HCD is clearly a part of cosmopolitanism mentioned in the introductory part of the chapter.⁵³ However, as the HCD’s decision in this case did not directly relate to the introduction of ecocide as an offence, this judgment may be treated more as *obiter dicta* and academic exercise than lawmaking. To what extent these observations of the SCB translate into actual law by the Parliament remains to be seen.

In *Tamanna Ferdous v Government of Bangladesh and Others*,⁵⁴ the matter at issue was a habeas corpus writ petition by the mother of a child fighting a custody battle against her ex-husband. In passing its judgment, the HCD ordered that all family courts in Bangladesh settle custody and guardianship cases within 6 months of filing the case.⁵⁵ In passing this directive, the HCD invoked Article 109 of the *Constitution* which provides that ‘[t]he High Court Division shall have superintendence and control over all courts and tribunals subordinate to it.’ To this extent, it fits the second or third string of cases discussed above. However, the HCD

⁴⁸ *ibid.* [13].

⁴⁹ *ibid.* [9].

⁵⁰ *ibid.* [28].

⁵¹ *Bangladesh Environmental Lawyers Association (BELA) v Government of Bangladesh and Others* (2020), Writ Petition No. 1683 of 2014, 2 December 2020 (unreported) 125.

⁵² *ibid.* 117–123.

⁵³ Note also the observation of the HCD in *Southern Solar Power Ltd and another v Bangladesh Power Development Board and others* LEX/BDHC/0218/2019, [7] that, ‘the Constitution of Bangladesh empowers the High Court Division to declare any law to be void, this Court is competent to make observations about any law, *including what ought to be in the Act*’ [emphasis added].

⁵⁴ Writ Petition 7372/2021 (unreported), 7 November 2021.

⁵⁵ *ibid.* 5.

also opined that the fine of only 200 takas for any contempt of the Family Court as spelt out in Section 19 of the *Family Courts Ordinance*, 1985 is dated and should be increased and civil imprisonment should be imposed.⁵⁶ But the HCD was deferential to the Parliament in that it did not pass any order regarding this.

In *Tanzeen Bristy v Government of Bangladesh and Others*,⁵⁷ the HCD has taken a rather remarkable position in that it has arguably moved to the domain of international lawmaking. In this case, Tanzeen Bristy, a dual citizen of Bangladesh and Canada, along with her mother, while en route to Canada by an Etihad Airways flight, was allegedly harassed by the airline staff at Abu Dhabi International Airport. They were forced to fly back to Dhaka at their own cost. This allegedly happened during a stopover at Abu Dhabi International Airport. The staff at the check-in counter stamped Ms. Bristy's boarding pass but somehow forgot to stamp her mother's, which also evaded their attention. Upon returning to Dhaka, she first lodged a general diary with Bangladesh police. Then she filed a writ petition seeking remedies for her harassment. In upholding her claim, the HCD has observed that the International Civil Aviation Organization (ICAO) is more friendly to the international airlines than to passengers and this needs to change.⁵⁸ Thus, the HCD by taking a swipe at ICAO is alluding to the need for reform of international law and arguably charting into the waters of international lawmaking. This seems to be a remarkable judgment, but its practical value is dubious.

22.6 What Does Tomorrow Hold?

Judge Sachs has observed that '[i]n mature supreme courts, legal debate tends to revolve not around the enunciation of new principles, but around expanding or contracting the outer frontiers of the court's own precedent.'⁵⁹ By the duration of the SCB's existence, one may contend that the SCB has matured. However, one must not forget that the outright illegal martial law regimes and the political brinkmanship may have meant that the SCB had to grapple for its independence. Only time can tell whether the contemporary practice of issuing directives is a bellwether of the future or not. The judicial lawmaking has concentrated on apolitical matters and so the friction could be avoided.⁶⁰ There are instances of the government at the highest level not mincing words when it comes to expressing views about the judgments of the SCB.⁶¹ It may be worth noting that in many of the cases of apparent judicial

⁵⁶ *ibid.*

⁵⁷ Writ Petition No. 6049 of 2011 (unreported), 8 October 2020.

⁵⁸ *ibid.* 120–121. The Court even asked its Registrar General to transmit a copy of the judgment to the ICAO via email.

⁵⁹ Justice Albie Sachs, *The Strange Alchemy of Life and Law* (OUP 2009) 52.

⁶⁰ Of course, there are exceptions such as Masdar (n 6).

⁶¹ *Re an Application of Mr Habibul Islam Bhuiyan, President, Supreme Court Bar Association* (1999) 19 BLD (AD) 93, *Mainul Hosein & others v Sheikh Hasina Wazed* (2001) 53 DLR (HCD) 138.

lawmaking, even the government lawyers did not contest to that exercise.⁶² This would probably imply that while textually speaking the SCB took it upon itself to craft law, the position of the SCB was in sync with that of the government. Alternatively, the matters at issue were not at all politically sensitive or somewhat low-key affairs for the government. However, the same may not hold if the SCB ventures into the terrain which are politically more sensitive.

While there seems to be no systemic study, it may be fair to state that traditionally the engagement with precedents is relatively modest in the academic legal literature of Bangladesh. Should in the future more academic legal works engage with precedents, it would be interesting to note to what extent that has an impact on the judicial lawmaking. As judges are careful about their prestige and image, it is possible that during their judgments when they would involve in judicial lawmaking what kind of academic critique the judgment may elicit would be a factor that they would weigh in.⁶³ If this happens the disconnect (real or perceived) between the academia and legal profession in Bangladesh,⁶⁴ may reach a new dimension.

22.7 Conclusion

As the constitutional court of Bangladesh, the SCB cannot simply deny exercising jurisdiction in cases where it may be called upon by the parties to decide on points on which there is some vacuum in the existing statutory law and precedents. As the Court of last resort, it would have to fill such a void in one way or the other. However, reasonable minds can differ as to whether the SCB has always been limited to filling the voids or ventured beyond that limited and non-controversial domain. Legitimate disagreement is also possible on whether that venture has happened justifiably or not, and how that has impacted on the democracy in Bangladesh. While judicial appointment in Bangladesh may have sometimes been politicised,⁶⁵ generally, the

⁶² For example, Chowdhury (n 6).

⁶³ Posner (n 8) 269.

⁶⁴ For instance, Kamir (n 29) [88] observing that:

[T]his is a high time to consider a proposal to develop a process for the enrolment of academia (such as university teachers) as advocate opening the doors of the courts for their practice. Both the Bar Council and law faculties across the country must sit together to facilitate this avenue. Even in late sixties and seventies there had been a very good nexus between the lawyers and legal education institution. Many highly reputed lawyers used to regularly teach in universities and law colleges. But unfortunately[,] this nexus now almost is non-existent. A good practice has died off, but it should not preclude us in attempting to create new practices. Legal academia and legal profession must have a very close tie; it is the demand of this time.

⁶⁵ M. Ehteshamul Bari, 'Supersession of the Senior-Most Judges in Bangladesh in Appointing the Chief Justice and the Other Judges of the Appellate Division of the Supreme Court: A Convenient Means to a Politicized Bench' (2016) 18 *San Diego Journal of International Law* 33.

judiciary seems to have taken a rather circumspect role in addressing political questions. It may be said that the SCB's lawmaking venture has more often than not been somewhat non-confrontational as it is evident from some of the cases discussed above where the government did not contest the position of the petitioner seeking an expansive role of the SCB. When it comes to the independence of judiciary, the SCB seems to have been assertive in its lawmaking role. In some relatively apolitical matters, the same assertiveness seems to be present where the SCB may have been buoyed by the direct or tacit consent of the executive in its lawmaking venture.⁶⁶ One can surmise that the public demand or perception in these areas could also have swayed the SCB to assume a more direct role in this type of cases.

In assessing the role of the SCB in judicial lawmaking one cannot but recall that it had to grapple with blatantly unconstitutional martial law regimes and limping democratic rules during a considerable part of Bangladesh's journey as a state. These two factors must have weighed heavily on the SCB in many constitutional cases. It is also uncertain when on emotive apolitical issues (such as the right of euthanasia) on which the public opinion may be sharply divided, how the SCB would venture in it. Irrespective of what the SCB does in such 'hard cases',⁶⁷ this would likely make the SCB a subject of public controversy and how the public responds to such a controversy which would be riveting to witness. While there is no empirical study to back this up, it may be fair to claim that despite controversies about the politicisation of appointments to the SCB and Judges sometimes not being able to stand up to the power, this would be a new terrain of controversy for the SCB. One can only surmise that the public confidence in the judiciary and the state of democratic institutions would significantly influence the SCB's choice in those future cases.

References

Books

- Cardozo, Benjamin N. 1921. *The Nature of the Judicial Process*. New Haven: Yale University Press.
- Dworkin, Ronald. 1986. *Law's Empire*. Cambridge: Harvard University Press.
- . 1997. *Taking Rights Seriously*. London: Bloomsbury.
- Posner, Richard A. 2008. *How Judges Think*. Cambridge, MA: Harvard University Press.
- Sachs, Justice Albie. 2009. *The Strange Alchemy of Life and Law*. OUP.
- Scalia, Antonin, and Bryan A. Garner. 2012. *Reading law: The interpretation of legal texts*. St. Paul: Thomson.
- Yap, Po Jen, ed. 2019. *Constitutional Remedies in Asia*. London: Routledge.
- , ed. 2020. *Proportionality in Asia*. Cambridge University Press.

⁶⁶ Chowdhury (n 6).

⁶⁷ This term is borrowed from Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 1997) chap. IV.

Articles

- Ahmed, Nizam. 2006. Executive Judiciary Relations in Bangladesh. *Asian Affairs* 33 (2): 103–122.
- Alford, Roger P. 2005. In Search of a Theory for Constitutional Comparativism. *UCLA Law Review* 52: 639.
- Bari, M. Ehteshamul. 2016. Supersession of the Senior-Most Judges in Bangladesh in Appointing the Chief Justice and the Other Judges of the Appellate Division of the Supreme Court: A Convenient Means to a Politicized Bench. *San Diego Journal of International Law* 18: 33.
- Baude, William, and Stephen E. Sachs. 2017. The Law of Interpretation. *Harvard Law Review* 130: 1079.
- Berger, Raoul. 1988. Originalist Theories of Constitutional Interpretation. *Cornell Law Review* 73: 350.
- . 1997. Ronald Dworkin's The Moral Reading of the Constitution: A Critique. *Indiana Law Journal* 72: 1099.
- Chandler, Jason. 2011. Foreign Law – A Friend of the Court: An Argument for Prudent Use of International Law in Domestic, Human Rights Related Constitutional Decisions. *Suffolk Transnational Law Review* 34: 117.
- Goldsworthy, Jeffrey. 1997. Originalism in Constitutional Interpretation. *Federal Law Review* 25: 1.
- Islam, Md. Rizwanul. *Oxford International Law in Domestic Courts Series*, ILDC 3088 (BD 2009).
- . 2016. Judges as Legislators: Benevolent Exercise of Powers by the Higher Judiciary in Bangladesh with Not So Benevolent Consequences. *Oxford University Commonwealth Law Journal* 16 (2): 219.
- Islam, Md. Rizwanul, and Md. Tayeb-Ul-Islam Showrov. 2017. Sifting through the Maze of “Person Aggrieved” in Constitutional Public Interest Litigation: Has Abu Saeed Case Ushered a New Dawn? *Dhaka University Law Journal* 28: 155.
- Kersch, Ken I. 2005. The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law. *Washington University Global Studies Law Review* 4: 345.
- Waldron, Jeremy. 2005. Foreign Law and the Modern Ius Gentium. *Harvard Law Review* 119: 129.

Md Rizwanul Islam is a Professor at Department of Law, North South University, Bangladesh and a Co-Chair of the Teaching International Law Interest Group of the American Society of International Law. He obtained LLB from the University of Dhaka, LLM from the National University of Singapore, and PhD from Macquarie University, Australia. He is the author and editor of over thirty books, book chapters, journal articles published in top-class outlets across the world. He twice received the Macquarie University Faculty of Arts Higher Degree Research Award for Best Candidate Publications. He has acted as a consultant and Fellow in projects funded by the World Bank, UNDP, and national NGOs. He has been awarded President's Gold Medal for his paper titled ‘Judges as Legislators: Benevolent Exercise of Powers by the Higher Judiciary in Bangladesh with not so Benevolent Consequences’ as the Best Research Article in the subject category of Arts, Humanities, Education, and Law of the year 2016 in Bangladesh.

Chapter 23

Public Interest Litigation and the Constitution of Bangladesh: Past, Present, and Future



Ali Mashraf and Tahseen Lubaba

Abstract The autochthonous architecture of the Constitution of Bangladesh provides a foundational back up to an activist legal fraternity. At the beginning of its journey, the idea of public interest litigation (PIL) started developing with *Kazi Mukhlesur Rahman* case in 1974, even before India started its social interest litigation. After a long hiatus, the Supreme Court (SC) of Bangladesh finally expanded the ambit of locus standi of PIL. Such a socially motivated gateway to the court has been abused to the extent that the court had to intervene to differentiate between PIL and private interest litigation. Finally, in 2016, the SC came up with a framework for narrowing the ambit of *locus standi* in PIL. This chapter critically evaluates the journey of PIL in Bangladesh and lays a roadmap for the future.

Keywords Public interest litigation · Locus standi · Compensation · Enforcement · Judicial overreach

23.1 Introduction

The concept of public interest litigation (PIL) in Bangladesh has experienced both praises and criticisms. In what was referred to as an ‘unnoticed but quiet’ revolution through the pronouncement in *Kazi Mukhlesur Rahman v Bangladesh*¹ in 1974, the recognition that a citizen need not be individually affected to move to the court when the breach is one of public rights and interests planted the seeds for the growth

¹ (1974) 3 CLC 1181 (AD).

A. Mashraf (✉)
Department of Law, East West University, Dhaka, Bangladesh
e-mail: ali.mashraf@ewubd.edu

T. Lubaba
Dhaka District and Sessions Court, Dhaka, Bangladesh
e-mail: tahseenlubaba@gmail.com

of PIL in Bangladesh. Frequent disruptions of the constitutional framework and upheavals of the democratic environment resulting in the ‘intermittent de-clothing of the Constitution’² tested the forum through attempts at use and misuse in the years to follow. Nevertheless, the use of PIL for the protection of myriad of rights of the impoverished and the marginalised has resulted in the development of progressive announcements, innovative mechanisms, and a proactive role of the judiciary. Judgments on a range of issues, starting from the protection of environmental rights, right to life and personal liberty, custodial torture, sexual harassment, custodial rape, etc., have laid the groundwork for a gradual progress of the legal framework of Bangladesh. The constitutional framework of Bangladesh – its high ideals and repeated affirmation of ‘people as the source of power’ – as enumerated in article 7(1) has provided a fertile ground for the growth of PILs. However, some questions are still left unanswered and some improvements in collaboration are still to be sought between stakeholders before the spirit behind PIL is fully realised and the judicial pronouncements are meaningfully upheld.

This chapter begins with a history that leads to establishing PIL as a concept within the constitutional scheme. Then, it branches out to the themes within which PILs have been popularly and successfully filed, catching the reader up to speed on the current position of PIL, followed by a discussion on the challenges to the efficacy of PILs. The chapter concludes with some recommendations for the judiciary.

23.2 Origin of PIL

Unnoticed but quiet revolution³: *Kazi Mukhlesur Rahman case* and recognition of the citizen’s right on ‘constitutional issues of grave importance

In *Kazi Mukhlesur Rahman*, the writ petitioner challenged the legality of the agreement between the Governments of Bangladesh and India of 16 May 1974 on grounds that the purported retaining of the southern half of Berubari Union no. 12 was a cessation of the Bangladeshi territory. The respondents argued that the petitioner, not being a resident of the said area, did not have *locus standi*. The Appellate Division (AD) of the SC considered the question of *locus standi*. It considered the Indian case of *Maganbhai Ishwarbhai Patel v Union of India*,⁴ which was relied on by the respondents and noted that it was the only case which ‘approximate[d]’ the issues raised in the writ petition. The Indian Supreme Court (SC) in the *Maganbhai* case stated that only one Mr. Madhu Limaye (who was not a resident of the disputed territory but attempted to penetrate the same) would be able to claim the deprivation of fundamental rights.

² *Dr Mohiuddin Farooque v Bangladesh* (WP No 891 of 1994, HCD) [34] (Mustafa Kamal, J).

³ *ibid* (Mustafa Kamal, J).

⁴ [1969] AIR SC 783, (1969) SCR (3) 254.

However, the AD reasoned in favour of the petitioner stating that (i) the case involved a ‘constitutional issue of grave importance’ involving the Bangladeshi territory; and (ii) the right to move freely is not local, but extends ‘to every inch of the territory of Bangladesh stretching up to the continental shelf’.⁵ This interpretation extended the definition of *locus standi* to include standing of any citizen when the question is one that affects the state as a whole. The AD did not limit itself to the consideration of ‘direct and substantial deprivation’ of rights, as taken into account by the Indian SC in *Maganbhai* but took a more liberal approach. It instead made its determination based on the question of ‘impending threat of deprivation’ of rights of the petitioner.⁶ The case also made some pertinent observations in responding to other arguments raised by the petitioner. It opined that the plea of ‘act of state’ may not be used to exclude the jurisdiction of the court when the issue is that of the ‘deprivation of rights and liberties of the citizen,’⁷ thereby reflecting a deeper regard for the protection of fundamental rights.

23.2.1 *Drawing a Line Between Representative Suits and PIL: AD in Bangladesh Sangbadpatra Parishad Case*

Although *Kazi Mukhlesur Rahman* opened an avenue for a progressive interpretation of the term ‘person aggrieved’ at a time when the concept of PIL was ‘yet to take roots’⁸ in the Indian jurisdiction, the AD’s observation in *Bangladesh Sangbadpatra Parishad v Government of Bangladesh*⁹ seemed to take a step back. In responding to the petitioner’s argument, the AD opined that the emergence of PIL in India has been ‘facilitated’ by ‘the absence of any constitutional provision as to who can apply for a writ.’¹⁰ It thus concluded that the Indian decisions are ‘hardly apt’¹¹ within the framework of article 102. However, the court’s rejection of the petitioner’s *locus standi* and emphasis on ‘specific legal right’ and ‘sufficient interest’ as the criteria for determining whether the petitioner is a ‘person aggrieved’ should not be read as an outright rejection of the concept of PIL. Sufficient interest would be discussed extensively in the *FAP 20 case*, thereby firmly establishing the concept of PIL in the domestic legal framework. The AD was cognisant of the possibility that the ‘meaning and dimension’ of the term ‘person aggrieved’ have been developed

⁵ *Kazi Mukhlesur Rahman* (n 1) [18].

⁶ *ibid*; Muhammad Ekramul Haque, ‘Constitutional Implications of the 1974 Land Boundary Agreement between Bangladesh and India’ in Seokwoo Lee (ed), *Encyclopedia of Public International Law in Asia* (Brill/Nijhoff, 2021) 36.

⁷ *Kazi Mukhlesur Rahman* (n 1) [19].

⁸ (1997) 7 BLD [3] (AD) (per ATM Afzal CJ).

⁹ (1991) 43 DLR 126 (AD).

¹⁰ *ibid* [8].

¹¹ *ibid*.

over the years¹² (and perhaps, would continue to do so). More specifically, the AD distinguished the *Sangbadpatra* case from PILs by clarifying that the case was ‘definitely’ not one of public interest, but one filed in ‘representative capacity’.¹³ The court emphasised that the petitioners did not appear on behalf of any downtrodden community unable to access the courts. Instead, they appeared on behalf of its members, whose access to courts was ‘without a doubt assured’.¹⁴

23.2.2 *Post Sangbadpatra Development*

In the subsequent years, several petitions sought to rely on the concept of ‘public interest’, but no comprehensive precedent was established on the question of *locus standi*. The lack of development of the concept may be attributed to the frequent disruptions of the constitutional order. However, the court began to proactively address issues of public interest within the newly restored democratic regime in 1991.¹⁵ The court played an active role in addressing the issue of deprivation of personal liberty. One such notable case was *State v Deputy Commissioner, Satkhira and others*,¹⁶ in which the court issued a *suo motu* order for release of Nazrul Islam, who was detained in custody for 12 years without trial. The question of representative suits arose again in *Bangladesh Retired Government Employees Welfare Association and others v Bangladesh*.¹⁷ Here, the court deviated from the principle espoused in *Sangbadpatra*. It opined that the court had the discretion to differentiate between the common interests of all retired government officials and that of ‘media magnates’.¹⁸ However, the decision did little to clarify the pertinent questions on *locus standi* in the context of PILs and *Sangbadpatra* being the decision of the AD, remained binding.

Other cases filed on issues of environment and consumer rights saw some early success, for example, the *Industrial Pollution case*¹⁹ and the *Doctor’s Strike case*.²⁰ But they failed to result in any comprehensive guidance. The period is also marked with attempts to invoke writ jurisdiction in political questions, resulting in the court rejecting the petitions.²¹ Overall, due to numerous practical and political

¹² *ibid* [9].

¹³ *ibid* [9], [10].

¹⁴ *ibid* [10].

¹⁵ Naim Ahmed, *Public Interest Litigation: Constitutional Issues and Remedies* (Bangladesh Legal Aid and Services Trust, 1999) 30.

¹⁶ (1993) 45 DLR 643 (HCD).

¹⁷ (1994) 46 DLR 426 (HCD).

¹⁸ *ibid* 34.

¹⁹ *Dr Mohiuddin Farooque v Bangladesh* (WP No 891 of 1994, HCD) as cited in Ahmed (n 15) 37.

²⁰ *Dr. Mohiuddin Farooque v Bangladesh* (WP No 1783 of 1994, HCD) as cited in Ahmed (n 15) 37.

²¹ Ahmed (n 15) 42.

considerations, as well as supervening facts and circumstances, no significant interpretation of article 102 for the accommodation of PILs was materialised.

23.2.3 *The Flood Action Plan 20 Case and Recognition of PIL*

In 1996, the AD, in hearing the appeal in *Dr Mohiuddin Farooque v Government of Bangladesh*,²² firmly recognised the acceptance of PILs and laid down the groundwork for the trend to follow. The petition arose out of a Flood Action Plan (FAP) for some regions in Tangail. This was a policy action, which, the petitioners claimed, was ‘anti-environment and anti-people.’ The petitioner argued extensively for the liberalisation of the concept of *locus standi*. In deciding in favour of the petitioner, the court emphasised that the Constitution of Bangladesh is not ‘just a replica with local adaptations of a Constitution of the Westminster model among the Commonwealth countries’.²³ Rather, flowing from the history of Bangladesh’s liberation struggle, it is a ‘fruit of a historic war of independence’²⁴ where the people are the ‘repository of all power.’²⁵

The judgment had several notable outcomes. The court’s approach to the judicial precedents from India (which had branched out significantly since the judgment in *Kazi Mukhlesur Rahman*) as well as examples from the US and UK proved two points. Firstly, it was appreciative of the judicial development of the concept of PIL in comparable jurisdictions (Justice Mustafa Kamal’s judgment sheds light on other jurisdictions in the region, including that of Sri Lanka and Pakistan) to highlight the growing global trend. And secondly, it nevertheless sought to base its own decision not by relying on the principles developed in comparable jurisdictions but on the history, roots, and legislative intent of the Bangladesh Constitution. The court drew inspiration from the history of the liberation struggle, the inclusion of rule of law as a foundational principle in the preamble, supremacy of the power of the people enshrined in article 7 of the Constitution and iterated the need to read article 102 in the spirit of the preamble and article 7. Viewed as such, the court opined that article 102 is in fact.

[A]n instrumentality and a mechanism, containing both substantive and procedural provisions, by means of which the *people as a collective personality, and not merely as a conglomerate of individuals*, have devised for themselves a method and manner to realise the objectives, purposes, policies, rights and duties which they have set out for themselves and which they have strewn over the fabric of the Constitution (emphasis added).²⁶

²² (1997) 17 BLD 1 (AD).

²³ *ibid* [41].

²⁴ *ibid*.

²⁵ *ibid* [42].

²⁶ *ibid* [46].

This viewing of the people as a collective personality lends credence to the concept of any concerned citizen or activist group coming forward when a group has been ‘collectively wronged or injured’ or their ‘collective fundamental rights have been invaded’.²⁷

Apart from the court’s endorsement of PILs in cases of public injury, the judgment also progressively interpreted the concept of ‘right to life’ under article 32 of the Constitution. The case arose out of detrimental environmental policy, with the petitioner highlighting, and the court recognising the intersection between ‘environmental hazards and ecological imbalance’²⁸ and enjoyment of right to life, property and profession, among others. The judgment preceded the insertion of article 18A to the Constitution by which the protection of environment was made a duty of the state.

The judgment also highlighted the need to ensure proper utilisation of the concept of PIL and prevent the misuse of the forum. At the onset, it drew from the Indian court’s judgment in *SP Gupta and others v Union of India*²⁹ to state the importance of judicial discretion in determining the existence of ‘sufficient interest’ and in doing so, stressed the need for the judiciary to be ‘on the same wave-length’ as the Constitution.³⁰ This leads the way for courts to duly exercise the tests and parameters while placing the highest values to the constitutional principle of socioeconomic justice and rule of law in reaching a decision on the ‘threshold stage’. The court also cautioned against entertaining petitions from ‘a busybody or an interloper’,³¹ or petitions filed with dubious goals of publicity or on behalf of ‘opulent members’ of the society who can otherwise access the courts themselves.³²

23.2.4 Slum-dwellers Eviction Case

The judgment of the High Court Division (HCD) of the SC in *Ain o Salish Kendra (ASK) v Bangladesh*³³ declaring the eviction of slum dwellers in Dhaka as unlawful was the first of its kind. The court held that the eviction was not done following proper legal procedure and a violation of article 31 of the Constitution, which incorporates the concept of ‘due process’. The progressive interpretation of articles 31 and 32 brought within its ambit the right to livelihood, shelter, and rehabilitation as can be drawn from several fundamental principles of state policy, including the

²⁷ *ibid* [48].

²⁸ *ibid* [103].

²⁹ [1982] AIR SC 149 as cited in *ibid* [7].

³⁰ *ibid*.

³¹ *ibid* [50].

³² *ibid* [39].

³³ (1999) 19 BLD 488 (HCD).

state's duty to ensure basic necessities³⁴ and 'respect for the dignity and worth of the human person'.³⁵ The court opined that the way in which the slum dwellers were evicted without due attention to their rehabilitation, rendering them shelter-less was an attack not only on their livelihood but also their human dignity, and the same was contrary to the spirit of the Constitution.³⁶ The question of *locus standi* did not arise as some of the evictees were added as parties. However, ASK successfully represented the affected slum dwellers in its capacity as a human rights NGO.

23.3 Use of PIL and Establishment of Rights After *Fap 20* and Present Scenario

The beginning of the twenty-first century witnessed the SC continuing the trend of *FAP 20 case* in determining standing of persons aggrieved in PIL cases. Petitioners started gaining more success by bringing their causes (PILs) to the SC and gaining favourable verdicts.³⁷

23.3.1 *From Establishing Right to a Healthy Environment as a Fundamental Right to Conferring Legal Personhood to Rivers: Following the Path of FAP 20 Case in Public Interest Environmental Litigations*

From the start of the twenty-first century, the SC increasingly followed the trend of prioritising environmental conservation and curbing environment pollution (as laid down in *FAP 20 case*) during a time when no particular constitutional provision regarding the environment existed until the 15th Amendment in 2011.³⁸ Some of the measures include – declaring right to a healthy environment as a fundamental right under the garb of right to life and personal liberty,³⁹ issuing writ of continuous *mandamus* (keeping writ petitions pending after issuing judgments for continuous monitoring by the court about the implementation of the judgments – a remedy

³⁴ Constitution of the People's Republic of Bangladesh, 1972, art 15.

³⁵ *ibid* art 11.

³⁶ ASK (n 33) [9].

³⁷ Ridwanul Hoque, 'Taking justice seriously: judicial public interest and constitutional activism in Bangladesh' (2006) 15(4) *Contemporary South Asia* 399, 403.

³⁸ Bangladesh Constitution (n 34) art 18A.

³⁹ *Dr Mohiuddin Farooque vs Bangladesh and others* (2003) 55 DLR 613; *Rabia Bhuiyan, MP v Ministry of LGRD and others* (2007) 59 DLR 176 (AD).

often resorted to by the Indian SC⁴⁰),⁴¹ granting injunctive relief to curb environmental pollution,⁴² issuing *suo motu* rule to protect rivers and water bodies from pollution and illegal encroachment,⁴³ indirectly applying principles of international environmental law while deciding cases,⁴⁴ etc.⁴⁵

However, the SC's judicial activism ventured towards overreach when it conferred legal personhood to the Turag river as well as all rivers in and flowing through Bangladesh,⁴⁶ in a writ petition that was originally filed to protect the Turag river from illegal encroachments and earth fillings.⁴⁷ It also declared the National River Conservation Committee (NRCC) as the legal guardian of rivers (*person in loco parentis*) to protect, conserve, and ensure development of all rivers in Bangladesh.⁴⁸ While the HCD based its reasoning borrowing from the precedents of Colombia, India, and legislative decision of New Zealand,⁴⁹ its overreach into such a significant policy matter has been criticised even by the AD.⁵⁰ The AD modified most of the directives out of the 17 directives laid down by the HCD. It also held that the HCD 'cannot direct the Parliament to enact or amend a law or declare any principle to be a part of our law'.⁵¹ Nevertheless, it did not interfere with the directive of conferring legal personhood on rivers, which remains operative till date.

⁴⁰ *Vineet Narain v Union of India* [1996] AIR 3386 (SC); *Bandhua Mukti Morcha v Union of India* [1984] AIR 802 (SC).

⁴¹ *Dr Mohiuddin Farooque* (n 39).

⁴² *Sharif N Ambia v Bangladesh and others* (WP No 937 of 1995, HCD, 6 February 2000); *Dr Mohiuddin Farooque vs Bangladesh and others* (WP 948 of 1997, HCD).

⁴³ *Human Rights and Peace for Bangladesh (HRPB) v Bangladesh and others* (WP No 3503 of 2009, HCD, 21 March 2010); *BELA v Government of Bangladesh and others* (WP No 4604 of 2004, HCD, 27 July 2005).

⁴⁴ *Bangladesh Paribesh Andolon v Bangladesh and others* (2006) 58 DLR 441 (HCD) where the reasoning of Iman Ali J indirectly points towards the principle of intergenerational equity; *BELA v Government of Bangladesh and others* (WP No 4958 of 2009, HCD, 14 January 2010) where the HCD indirectly applied the principle of sustainable development.

⁴⁵ For a detailed discussion, see Md Iqbal Hossain, *International Environmental Law: Bangladesh Perspective* (Ain Prokashoni, Dhaka, 2017) ch 12.

⁴⁶ *HRPB v Government of Bangladesh and others* (WP No 13989 of 2016, HCD, 30 January 2019 and 3 February 2019).

⁴⁷ For a comparative legal analysis of this judgment, see Farhana Helal Mehtab and Ali Mashraf, 'Declaration of Rivers as Legal Persons: A Comparative Study between Bangladesh and Other Countries' in R N Sharma (ed), *Environmental Sustainability and Development (Recent Trends and Issues)* (School of Law, IMS Unison University 2020)

⁴⁸ *HRPB* (n 46) 278–279.

⁴⁹ *ibid* 273–276.

⁵⁰ *Nishat Jute Mills Limited v HRPB* (CPLA No 3039 of 2019, AD, 17 February 2020) <http://nrccb.portal.gov.bd/sites/default/files/files/nrccb.portal.gov.bd/notices/4569e59a_762b_41a2_95ca_0c462408f25c/2020-09-01-11-55-8a72b183077f80c5e8671bb4a0d7a5f1.pdf> accessed 8 November 2022.

⁵¹ *ibid* 35–40.

23.3.2 *On Issues Relating to Right to Life and Personal Liberty: Testing the Constitutionality of Abuse of Powers by Police and Executive*

Perhaps the most significant and effective intervention by the HCD in a PIL came in *Bangladesh Legal Aid and Services Trust (BLAST) v Bangladesh and others*,⁵² a petition challenging the abuse of police powers conferred under section 54 and 167 of the Code of Criminal Procedure (CrPC), 1898. While holding that the provisions in sections 54 and 167 of CrPC are not fully compliant with the provisions contained in part III of the Constitution, the HCD first issued seven elaborate recommendations to amend those provisions in CrPC and the interconnected provisions in the Police Act, 1940, Penal Code, 1860, and the Evidence Act, 1872.⁵³ Thereafter, it issued 15 guidelines for police on exercising powers regarding arrest, detention, and remand of Bangladeshi citizens.⁵⁴

On appeal, the AD dismissed some of the HCD recommendations, but upheld the decision.⁵⁵ It also issued 10 guidelines to the law enforcement agencies and 9 guidelines to magistrates, judges, and tribunals having power to take cognisance of an offence.⁵⁶ The increasing practice of ensuring production of arrested persons before magistrates within 24 hours of their arrest and the enactment of the Custodial Torture and Death (Prevention) Act, 2013 to curb torture and death of citizens in custody are two remarkable by-products of this judgment.

Most recently, in a PIL to prevent instances of arresting individuals mistakenly in criminal cases by police due to having similar names or due to the accused fraudulently using false identity of another person, the HCD gave three directives to the Ministry of Home Affairs.⁵⁷ The directives include:

[I]ntroducing biometric data management system including fingerprints, palm print and iris scanning in all police stations and jails across Bangladesh and taking mugshot photographs of arrested individuals as their primary identifier and uploading such photographs in an integrated database.⁵⁸

The guidelines, if materialised, will go a long way towards digitalisation of the Bangladesh prison system and ensuring that innocent citizens do not fall prey to cases of mistaken identity and languish in jails.

⁵² (2003) 55 DLR 363 (HCD).

⁵³ *ibid* 21–35.

⁵⁴ *ibid* 36–38.

⁵⁵ *Bangladesh and others v BLAST and others* (2016) 8 SCOB 1 (AD) <http://www.supremecourt.gov.bd/resources/bulletin/8_SCOB_AD_1.pdf> accessed 8 November 2022.

⁵⁶ *ibid* 122–124.

⁵⁷ *Muhammad Zahir Uddin v Government of Bangladesh* (WP No 3278 of 2020, HCD, 9 September 2021).

⁵⁸ *ibid* 8.

23.3.3 PILs on Women's Rights: Ensuring Gender Justice and Equality for Women

When numerous reports in the print media emerged about the imposition and execution of cruel and extra-judicial punishments by issuing *fatwas*,⁵⁹ the HCD issued rules in three separate writ petitions questioning the legality of *fatwas*.⁶⁰ The HCD treated the newspaper reports as 'applications under article 102 of the Constitution'. Thereafter, the HCD discussed the applicability of issuing *fatwas*, a part of Islamic Sharia, in light of the statutes in Bangladesh. It held that the Muslim Personal Law (Shariat) Application Act, 1937 does not recognise issuing of punishment via *fatwas*.⁶¹ The HCD further held that the imposition of such *fatwas* violates the provisions in the Constitution,⁶² other statutes in Bangladesh (thus being an offence under the relevant provisions of the Penal Code, 1860),⁶³ and international legal instruments prohibiting torture and cruel punishment.⁶⁴ The HCD then made the rules absolute, declared extra-judicial punishments via *fatwas* illegal, and ordered persons issuing such *fatwas* to be criminally responsible under the Penal Code and other applicable laws.⁶⁵

On appeal, the AD held that on issues of violation of fundamental rights, the HCD can issue *suo motu* rules based on newspaper reports, post-cards, letters, telegrams etc. being presented to them.⁶⁶ The AD decided to waive the 'procedural formalities' of presenting an application under article 102 and endorsed the HCD's view of treating the newspaper reports as application for 'protecting social rights and vindicating public interest and rule of law'.⁶⁷ Lastly, the majority judgment held that only properly educated persons may issue *fatwas* on religious matters.⁶⁸ However, such *fatwas* cannot infringe upon 'the right, reputation or dignity of individuals' nor can *fatwas* 'impose punishments, including physical violence and mental torture'.⁶⁹ Moreover, it held that *fatwas* can only be accepted voluntarily by someone, not by coercion or undue influence.⁷⁰ The case not only announced the court's commitment to upholding the right, reputation, and dignity of women by

⁵⁹ Ruling on questions of Islamic law provided by 'Muftis', or experts.

⁶⁰ *BLAST and others v Government of Bangladesh and others* (2011) 16 MLR 61 (HCD).

⁶¹ *ibid.* [38]–[40].

⁶² *ibid.* [29]–[32].

⁶³ *Ibid* [45].

⁶⁴ *ibid.* [42].

⁶⁵ *ibid.* [51].

⁶⁶ *Mohammad Tayeeb v Government of the People's Republic of Bangladesh* (CA No 593–594 of 2001, AD, 12 May 2011) <http://www.supremecourt.gov.bd/resources/documents/800933_CA593.pdf> accessed 8 November 2022.

⁶⁷ *ibid.* 132.

⁶⁸ *ibid* 137.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

curbing the practice of imposing cruel and degrading punishment to women via *fatwas*, but it also established the epistolary jurisdiction of the HCD (which was already an established practice in India long ago). However, the AD cautioned the HCD to be careful in exercising activism ‘in the interest of justice’ and not be adventurist in such instances.⁷¹

In *Bangladesh National Women Lawyers’ Association (BNWLA) v Government of Bangladesh and others*,⁷² the petitioners challenged the inaction of the government to ‘frame guidelines, or adopt policies or enact legislation to eliminate sexual harassment of women and girls and safeguard their rights in educational institutions, workplaces, public places, etc’.⁷³ The HCD referred to Bangladesh’s accession to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as well as numerous pronouncements by the Canadian and Indian apex courts.⁷⁴ It then issued 11 directives in the form of guidelines to the government and ordered them to be strictly followed in all public and private educational institutions and workplaces till the government enacted the appropriate legislation in this matter.⁷⁵ This was the first time that the apex court defined ‘sexual harassment’ and outlined the mechanism for handling and disposing of sexual harassment complaints.⁷⁶ Later, in *BNWLA v Government of Bangladesh and others*,⁷⁷ the HCD modified the definition of sexual harassment to suit the need of modern times.⁷⁸ It further defined the term ‘stalking’ and held that the definition would be applicable in all public places and educational institutions and workplaces.⁷⁹

23.3.4 *On Establishing Compensatory Jurisprudence in Instances of Violation of Fundamental Rights*

While the matter of awarding compensation as a remedy for the violation of fundamental rights under public law (article 102) has been a contentious issue from early days since independence,⁸⁰ the concept had to withstand the test of time before

⁷¹ *ibid.* 28.

⁷² (2009) 14 BLC 694 (HCD) <<https://uniteforreproprights.org/wp-content/uploads/2018/01/BNWLA-Bangladesh-2009.pdf>> accessed 8 November 2022.

⁷³ *ibid.*

⁷⁴ *ibid.* 15, 20–22.

⁷⁵ *ibid.* 23–30.

⁷⁶ *ibid.*

⁷⁷ (2011) 31 BLD 324 (HCD).

⁷⁸ *ibid.* 334.

⁷⁹ *ibid.* 334, 335.

⁸⁰ *Government of Bangladesh represented by Secretary Ministry of Home Affairs v Ahmed Nazir* (1975) 27 DLR 41 (AD).

being an established practice and remedy in our apex court.⁸¹ Finally, the HCD in *ZI Khan Panna v Bangladesh and others*⁸² held monetary compensation to be ‘useful and at times perhaps the only effective remedy to apply balm to the wounds’ in instances of the violation of fundamental rights in addition to remedies available under private law since they are ‘long-drawn-out and cumbersome judicial process’.⁸³ This reasoning became favourable for the petitioners in *Children’s Charity Bangladesh (CCB) Foundation v Bangladesh and others*,⁸⁴ which is dubbed as the first-ever public law compensation case in Bangladesh since the petitioner solely argued for compensation as a remedy due to the violation of fundamental rights of a Bangladeshi citizen.⁸⁵ Apart from heralding a new era in the domain of public law compensation by awarding Taka 20 lakh (20,00,000/- in Bangladesh currency) as compensation to the parents of Jihad,⁸⁶ the HCD held that this would not affect other liabilities of the respondents due to Jihad’s wrongful death.⁸⁷ The HCD referred to many leading cases from the Indian and Bangladeshi jurisdictions while awarding this compensation. It also outlined how article 146 of the Bangladesh Constitution does not ‘distinguish between sovereign and non-sovereign acts’ nor does it limit the liability of the government, which the Indian Constitution does under its article 300.⁸⁸ Thereafter, five more cases have followed *CCB Foundation’s* path to ensure compensation for the violation of fundamental rights by public bodies, making it an established trend today.⁸⁹

⁸¹ Taqbir Huda, ‘Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh’ (2020) 21(2) *Australian Journal of Asian Law* 27–46.

⁸² (2017) 37 BLD 271 (HCD).

⁸³ *ibid.* [68].

⁸⁴ (2017) 5 CLR 278 (HCD).

⁸⁵ For details, Farhana Helal Mehtab and Ali Mashraf, ‘Decoding *Children’s Charity Bangladesh (CCB) Foundation v Government of Bangladesh*: The First Ever Public Law Compensation Case in Bangladesh and the Way Forward’ (2019) 4(2) *Bangladesh Institute of Legal Development Law Journal* 9–31.

⁸⁶ *CCB Foundation* (n 84) [108].

⁸⁷ *ibid.* [109].

⁸⁸ *ibid.* [80], [96].

⁸⁹ *Md Rustom Ali and others v The State* (2017) 5 CLR 154 (AD); *Sifat Mahmud v Bangladesh* (2017) 5 CLR 276 (HCD); *Md Ruhul Quddus v Government and others* (2019) 7 CLR 665 (HCD); *Banu v Bangladesh* (WP No 7297 of 2019, HCD, 31 December 2020) <http://supremecourt.gov.bd/resources/documents/1638236_WP_7297_of_2019_2.pdf> accessed 8 November 2022 – the order for compensation has been stayed by AD till the disposal of appeal; *Mohammad Zahirul Islam v Government of Bangladesh and others* (WP No 5508 of 2017, HCD, 30 June 2021) <http://www.supremecourt.gov.bd/resources/documents/1146265_W.P.5508of2017.pdf> accessed 8 November 2022 – the order for compensation has been stayed by AD till the disposal of appeal.

23.3.5 *Horizontal Enforcement of Fundamental Rights: Private Bodies Under Scrutiny in PILs*

While the HCD in numerous earlier instances held that the expression in article 102 ‘...may give such directions or orders to any person or authority...’ meant that writs would be ‘maintainable against any person including a private company’,⁹⁰ the concept was solidified first in *Rokeya Akhter Begum v Bangladesh and others*.⁹¹ In *Rokeya*, the HCD held that not only ‘the source or power of the origin alone’, but also ‘the nature of the function’ (i.e. whether the body in question ‘performs functions in connection with the affairs of the republic or a local authority’) should be tested while holding a private person liable under article 102.⁹² The HCD referred to the Indian⁹³ and English⁹⁴ precedents in establishing the functions test. Afterward, *Moulana Md Abdul Hakim v Bangladesh*⁹⁵ followed the path of *Rokeya*⁹⁶ to declare the order dismissing the principal of a private madrasah managing committee unlawful. The HCD referred to the past Bangladeshi cases where actions of private persons were challenged in writ jurisdiction as well as the English cases⁹⁷ referred in *Rokeya*.

Lastly, in *Liberty Fashion Wears Limited v Accord Foundation*,⁹⁸ the HCD accepted both the source test – ‘source of the power of the body’ and the functions test – ‘nature of the functions exercised by it’ to determine if the actions of a private body will be amenable to judicial review.⁹⁹ Thus, a private body ‘stepping into the shoes of a public body’ opens up the avenue for its actions to be scrutinised under writ jurisdiction.¹⁰⁰ The case referred to all past precedents of Bangladesh jurisdiction and precedents from India and the UK in reaching its conclusion. Halim submits that these three cases have been the ‘beacon of hope’ in paving the

⁹⁰ *Conforce Ltd v Titas Gas Transmission* (1990) 42 DLR 33 (HCD); *Farzana Moazzem v Securities and Exchange Commission and others* (2002) 54 DLR 66 (HCD).

⁹¹ (2018) 6 CLR 206 (HCD).

⁹² *ibid.* [73], [86].

⁹³ *Anandi Mukta Sadguru Shree Mukta Jeevandasswami Suvarna Jaya v V R Rudani and others*, [1989] AIR 1607 (SC).

⁹⁴ *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* (1993) 1 WLR 909; *R v Panel on Take-overs and Mergers, ex parte Datafin PLC and another* (1987) QB 815.

⁹⁵ (2018) 10 SCOB 71 (HCD).

⁹⁶ Md Abdul Halim, *Procedure and Practice in Supreme Court: General and Civil Side* (Volume-II) (CCB Foundation, Dhaka 2018) 40.

⁹⁷ In addition, the HCD also referred to *R v Lloyd’s of London, ex parte Briggs* (1993) 1 Lloyd’s Rep 176.

⁹⁸ (2018) 6 CLR 107 (HCD).

⁹⁹ *ibid.* [49].

¹⁰⁰ *ibid.*

path for more opportunities for the horizontal enforcement of fundamental rights in Bangladesh.¹⁰¹

23.3.6 *On Locus Standi: From Liberalising to Narrowing Its Ambit*

While the beginning of the twenty-first century saw the principle of liberalising *locus standi* in *FAP 20* case being followed by the SC in subsequent PILs, the principle has been complemented and supplemented through more decisions over time. In *Ekushey Television Ltd v Dr Chowdhury Mahmud Hasan and others*,¹⁰² the court held that the interpretation of ‘sufficient interest’ is primarily a question of fact and law to be decided by courts.¹⁰³ However, the court did in fact take into consideration that the ‘narrow confines of rule of standing’ had been broken and ‘new dimensions were being added to the doctrine of *locus standi*’.¹⁰⁴

Surprisingly, the horizon of PIL was confined in *National Board of Revenue (NBR) v Abu Sayeed Khan*,¹⁰⁵ where the court framed 14 guidelines for the HCD in entertaining PILs. In a nutshell, the judgment sought to tighten the scope of filing PILs, while ensuring that grave instances of violation of human rights, primarily of disadvantaged classes of society, do not go unnoticed. The guidelines on not veering into reviewing policy matters, executive and legislative actions in PILs strongly remind the court to bear in mind the doctrine of separation of powers.

This precedent was creatively enforced in *Advocate Asaduzzaman Siddiqui and others v Bangladesh*,¹⁰⁶ when the court upheld the standing of the petitioners stating that as advocates of the SC, they had valid concerns about ‘the independence of the judiciary, separation of powers and establishment of rule of law’.¹⁰⁷ Thus, being stakeholders in the administration of justice, the petitioners came up with the PIL to vindicate the interests of the public.¹⁰⁸ Consequently, the court found them not be busybodies or interlopers and held that the decision in *NBR* did not create any hindrance for them in coming up with this cause.¹⁰⁹

¹⁰¹ Halim (n 96) 43; For a critical analysis on the establishment of the trend of horizontal enforcement of fundamental rights in Bangladesh, see also Ridwanul Hoque, ‘Horizontality of Fundamental Rights in Bangladesh’ (2021) 32(1) Dhaka University Law Journal 55–72.

¹⁰² (2003) 53 DLR 26 (AD).

¹⁰³ *ibid* [48].

¹⁰⁴ *ibid*.

¹⁰⁵ (2013) 18 BLC 116 [36] (AD).

¹⁰⁶ (2016) 24 BLT (Spl) 1 (HCD).

¹⁰⁷ *ibid* 63.

¹⁰⁸ *ibid* 21.

¹⁰⁹ *ibid* 64–65.

23.3.7 *Current Practices: Constructing New Approaches in Determining Locus Standi and Granting Relief to Petitioners*

Very recently, another approach has been taken by the court in *M Asafuddowla v Bangladesh*,¹¹⁰ where the court held that as regular taxpayers of the country, the petitioner has the legitimate expectation of being apprised how his tax-money is spent by the government.¹¹¹ While the operation of the verdict has been stayed by the AD pending appeal hearing, this principle, if read together with that of *NBR*, adds a new dimension to the question of *locus standi*. Thus, Haque submits that ‘the legitimate expectation of the taxpayer has created sufficient interest in this matter, thereby establishing his *locus standi*’.¹¹² Consequently, taxpayers can have a legitimate interest in policy matters or executive decisions, which can be brought to the court in the form of PIL. They can easily put themselves into the shoes of an ‘affected party’, as mentioned in guideline 2 of *NBR*.

Another remarkable trend has been the order of awarding interest along with compensation as done in *Mohammad Zahirul Islam*.¹¹³ In this case, besides awarding compensation of Taka 2 crore and 70 lakh (2,70,00,000/- in Bangladesh currency), the HCD (by referring to Indian decisions) awarded interest at a rate of 8% to be calculated from the date of filing of the case till the compensation is paid to the victims.¹¹⁴ This mechanism can be a useful tool in ensuring that enforcement of compensation awards in PILs are not delayed as that will incur more costs in the form of interests for respondents.

23.4 Roadblocks and Hurdles: Evaluating the Efficacy of PILs

Determining the *locus standi* in PIL remains an unresolved issue. The terms – ‘busybody’ and ‘interloper’ – as mentioned in *NBR*, have not been defined by the court yet.¹¹⁵ Halim speaks of a more practical barrier where judges are reluctant to hear PILs and question why the petitioner decided to stand for the affected persons and why he/she has not collected their signatures.¹¹⁶

¹¹⁰ (2021) 15 SCOB 12 (HCD).

¹¹¹ *ibid* [22].

¹¹² Personal communication between Muhammad Ekramul Haque and the author on the judgment of the case.

¹¹³ *Mohammad Zahirul Islam* (n 89).

¹¹⁴ *ibid* 52–53.

¹¹⁵ Halim (n 96) 61.

¹¹⁶ *ibid*.

23.4.1 *Dilatory Tactics and Slow Response from Respondents*

Respondents, mostly the government and public bodies, remain quite slow in implementing the judgments in PIL cases. The most obvious example is the judgment in *BNWLA* where even after the pronouncement of the verdict in 2009, sexual harassment prevention committees have not yet been formulated in many public offices, workplaces, and educational institutions. In 2022, the HCD asked the government to submit a report on the progress regarding the steps taken to combat and curb sexual harassment in all governmental and non-governmental institutions in Bangladesh.¹¹⁷ Ironically enough, there exists no such committee in the subordinate courts and tribunals across Bangladesh. Thus, the judiciary themselves are lax in following up their own judgments.

Moreover, numerous judgments awarding compensation to petitioners are yet to be implemented. The judgments have either been stayed pending appeal hearing (this is a regular practice and appeals take years to get disposed due to case backlogs in the judiciary) or the respondents (mostly the government) keep delaying the payment of compensation. A July 2022 news report states that there are 33 non-implemented compensation verdicts of the HCD.¹¹⁸

23.4.2 *Judicial Overreach: Veering into Executive and Legislative Matters*

The *HRPB* judgment is arguably a major example of the HCD's overreach since it has exceeded its jurisdiction by declaring all rivers of Bangladesh as legal persons. While reversing many of the HCD's orders in *Nishat Jute Mills*, including one, where the HCD declared the polluter pays principle and precautionary principle as part of the laws of the land, the AD cautioned the HCD that law-making only remains within the domain of Parliament. In a positive response to the HCD's verdict, the NRCC prepared a new draft of the National River Conservation Commission (NRCC) Act, thereby expanding the functions of the NRCC. It also paid heed to the HCD judgment by incorporating many principles of the doctrine of public trust in the new draft Act.

However, keeping in mind the observation of the AD in *Nishat Jute Mills*, the ultimate enactment of the draft Act and how much of the initial formulations of the NRCC will be retained remains questionable. Earlier, both the AD and HCD, in *Bangladesh Bar Council (BBC) and others v A K M Fazlul Karim and others*¹¹⁹ and

¹¹⁷ *ASK v Bangladesh and others* (In re: WP No 8874 of 2021).

¹¹⁸ M Moneruzzaman, 'Dozens await compensation pending court hearing' *New Age* (Dhaka, 25 July 2022) <<https://www.newagebd.net/article/176691/dozens-await-compensation-pending-court-hearing>> accessed 8 November 2022.

¹¹⁹ (2017) 14 ADC 271.

Professor Syed Ali Naki and others v Bangladesh and others,¹²⁰ ventured into executive matters by limiting the number of seats in all law schools in each semester across the country (a university cannot admit more than 50 students in each semester in Bachelor of Laws (LLB) courses) and drawing up elaborate criteria for BBC regarding the advocate enrolment examinations.

23.4.3 Public Law Compensation: Lack of Guidance on the Liability and Quantum of Compensation

Firstly, the SC is yet to lay down a framework determining how to calculate compensation in PILs. In *CCB Foundation*, the HCD failed to reason why the case particularly needed compensation payment in lump sum and not on meticulous calculation of damages incurred.¹²¹ In *Banu*, the HCD took into account only the loss of unearned income while awarding compensation.¹²² In *Mohammad Zahirul Islam*, the compensation was awarded in lump sum without any reasoning on the fixed amount.¹²³ Secondly, in *Mohammad Zahirul Islam*, the court observed that the government could recover the amount of compensation paid to the petitioners from the respective defaulting officials. However, such an order as to whether the particular public body itself or only its delinquent/defaulting officials themselves will have to pay the compensation were not specified in the earlier verdicts. In *CCB Foundation*, which remains the first case where the public authorities also paid the compensation, the facts are unclear whether the money was recovered later from the negligent officials.

23.5 Conclusion: A Roadmap to Address the Present Challenges

Although the SC has time and again showed its enthusiasm and regard for PIL as a tool for socioeconomic justice, some procedural questions on the standing and limits of the court's discretion are yet to be conclusively answered judicially. The *locus standi* of persons aggrieved remains an ambiguous issue. The ambiguous guidelines in *NBR* create practical barriers for vindicating causes in public interest and ensuring legal remedies when victims themselves are unaware of grave violation of their fundamental rights. A harmonious reading of *NBR* along with *M Asafuddowlah* in the

¹²⁰ (2016) 36 BLD 417 (HCD).

¹²¹ *CCB Foundation* (n 84) [105].

¹²² *Banu* (n 89) 30.

¹²³ *Mohammad Zahirul Islam* (n 89) 52–53.

appeal of the latter can resolve this issue and keep the ambit of *locus standi* open for publicly ‘spirited individuals’.¹²⁴

To ensure that the SC does not veer into matters which are within the ambit of the legislature and executive, the AD’s guidelines in *NBR*, the decision in *Nishat Jute Mills*, and the most recent pronouncement in *Government of the People’s Republic of Bangladesh v Md Nurul Islam Khan and others*¹²⁵ deciding that ‘the HCD cannot pass orders or directions under article 102 in administrative policy or any policy matter of the Government’¹²⁶ must be borne in mind by courts at all times while hearing PILs.

On the issue of determining the quantum of compensation in appropriate cases, courts need to reason their judgment regarding the quantum they provide in compensation. While in *CCB Foundation*¹²⁷ and *Banu*,¹²⁸ the court observed that the compensation orders would not violate the petitioners’ rights or the respondents’ liabilities in further proceedings, the court cannot shy away from ordering the correct quantum of compensation to be paid to the victims owing to the violation of their fundamental rights merely because other statutes provide remedies too. The text of article 102(1) is clear in this matter, as it does not state anything regarding alternative remedies.

Moreover, on the issue of dealing with dilatory tactics of respondents and their inordinate delays in implementing verdicts and compensation orders, the court can issue cost order for delays *suo motu*,¹²⁹ or in contempt petitions if petitioners initiate such proceedings,¹³⁰ order for writs to be treated as continuous mandamus,¹³¹ add interest rate with compensation orders so that the interest adds up with the total amount of the compensation order with each passing day, etc.¹³² Such innovative means for the sake of establishing the fundamental rights of the citizens fall within the ambit of article 102.

¹²⁴ *NBR* (n 105) [36].

¹²⁵ CPLA No 4357 of 2018, AD, 29 August 2022 <http://www.supremecourt.gov.bd/resources/documents/1635427_C.P.No.4357_of_2018.pdf> accessed 8 November 2022.

¹²⁶ *ibid.* 9–10.

¹²⁷ *CCB Foundation* (n 84) [109].

¹²⁸ *Banu* (n 89) 31.

¹²⁹ *HRPB* (n 43); *BELA* (n 43); *State v Deputy Commissioner, Bogra and others*, (WP No 1389 of 1999); *State* (n 16).

¹³⁰ In the aftermath of the *CCB Foundation* judgment, the petitioner drew up contempt proceedings when the respondents were delaying the payment of compensation. Subsequently, the respondents paid the compensation and the HCD exonerated them from the contempt rule. See Staff Correspondent, ‘HC summons Railway DG for not paying compensation to Jihad’s family’ *The Daily Star* (Dhaka, 03 July 2018) <<http://www.thedailystar.net/city/high-court-summons-bangladesh-railway-director-general-for-not-paying-compensation-jihad-family-1599310>> accessed 13 August 2022.

¹³¹ *HRPB* (n 46) 281.

¹³² *Mohammad Zahirul Islam* (n 89) 52–53.

Parliament also needs to implement the mandate of article 44(2) to empower other courts (this may take place by a creation of a new forum altogether¹³³ or by empowering existing courts) to exercise the powers under article 102, at least in deciding PIL matters. This will significantly reduce the case backlog in the SC,¹³⁴ and ensure quick disposal of matters relating to grave and flagrant violation of fundamental rights of citizens. Swift disposal of cases is the first pre-requisite in ensuring that PILs are resolved in a timely manner. It also sends the positive message to the people that the SC takes incidents of violation of fundamental rights of citizens with utmost seriousness, which will go a long way towards rebuilding the trust of the people towards the judiciary.

References

Books

- Ahmed, N. 1999. *Public Interest Litigation: Constitutional Issues and Remedies*. Dhaka: Bangladesh Legal Aid and Services Trust.
- Halim, M.A. 2018. *Procedure and Practice in Supreme Court: General and Civil Side*. Vol. II. Dhaka: CCB Foundation.
- Hossain, M.I. 2017. *International Environmental Law: Bangladesh Perspective*. Dhaka: Ain Prokashoni.

Articles

- Hoque, R. 2006. Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh. *Contemporary South Asia* 15 (4): 399.
- Huda, T. 2020. Fundamental Rights in Search of Constitutional Remedies: The Emergence of Public Law Compensation in Bangladesh. *Australian Journal of Asian Law* 21 (2): 27–46.

Encyclopedia

- Haque, Muhammad Ekramul. 2021. Constitutional Implications of the 1974 Land Boundary Agreement between Bangladesh and India. *Encyclopedia of Public International Law in Asia* 3 (sec 7.2).

¹³³ Muhammad Rezaur Rahman and Jubaer Ahmed, 'Need for Constitutional court' *The Daily Star* (Dhaka, 5 July 2016) <<https://www.thedailystar.net/law-our-rights/need-constitutional-court-1250554>> accessed 3 November 2022.

¹³⁴ A 2020 report states that 4,52,963 cases are pending in the HCD. The number has increased over the last 2 years.

Internet Sources

- Moneruzzaman, M. 2022. Dozens await compensation pending court hearing' *New Age* (Dhaka, 25 July 2022). <https://www.newagebd.net/article/176691/dozens-await-compensation-pending-court-hearing>. Accessed 8 Nov 2022.
- Rahman, M R and Ahmed J. 2016. Need for Constitutional court. *The Daily Star* (Dhaka, 5 July 2016). <https://www.thedailystar.net/law-our-rights/need-constitutional-court-1250554>. Accessed 3 Nov 2022.
- Ridwanul, H. 2022. Horizontality of Fundamental Rights in Bangladesh. *Dhaka University Law Journal* 55–72. <https://doi.org/10.3329/dulj.v32i1.57180>. Accessed 28 Dec 2022.
- Staff Correspondent. 2018. HC summons Railway DG for not paying compensation to Jihad's family. *The Daily Star* (Dhaka, 03 July 2018). <http://www.thedailystar.net/city/high-court-summons-bangladesh-railway-director-general-for-not-paying-compensation-jihad-family-1599310>. Accessed 13 Aug 2022.

Ali Mashraf is a Lecturer at the Department of Law, East West University in Bangladesh. He completed his LLB (Honours) and LLM (with specialisation in international law) from the University of Dhaka. He received professional training in sports law from the National Law School of India University, Bangalore. He has researched and published journal articles and book chapters on access to justice, environmental law, criminal law, constitutional law, human rights issues, sports law, law reform, landmark judgments of the Bangladesh Supreme Court. Ali's research interests include constitutional law, human rights law, alternative dispute resolution, among others.

Tahseen Lubaba is a law graduate from the University of Dhaka. She is currently working as a member of the editorial team of the weekly Law Page of the Daily Star, a leading English newspaper of Bangladesh and a legal associate at a Bangladeshi law firm. She has published in business and human rights and has assisted on publications projects including an ILO Study on Sexual Harassment in the World of Work and the Bangladesh National Study on Human Trafficking. Her research interests include constitutional law, human rights, international economic law, and third world approach to international law, among others.

Index

A

Amendment process, 105, 113

B

Bangladesh, 1–4, 6–20, 28–33, 36–39, 44–62, 65–80, 84–99, 103–116, 121–136, 139–153, 158–171, 173–188, 198–201, 204, 206–208, 210, 214–222, 224–226, 230–246, 249–263, 267–281, 284, 287–296, 299–313, 317–332, 339, 340, 346, 348, 350, 354–365, 372–375, 377–382, 387–399, 401–403, 405, 406, 408–416, 418

Basic structure, 8, 71, 72, 105, 109–111, 114, 115, 208

Biodiversity, 18, 61, 251, 257, 258, 273, 276

Blue economy, 18, 19, 312

C

Challenges, 9, 11–19, 39, 141, 142, 146, 151, 153, 199, 201, 207, 216, 239–241, 244, 246, 254, 257, 268, 284, 290, 293, 296, 319, 324, 331, 361, 363, 382, 391, 394, 395, 402, 417–419

Children's rights, 215, 219–221

Civil society, 38–40, 60, 105–106, 108, 109, 123, 130, 144, 149, 151–152, 183, 187, 285, 396

Climate change, 17, 18, 249, 251, 253, 255, 263, 300, 304, 310

Communal harmony, 2, 15, 65–80

Comparative constitutions, 87, 203, 339, 346

Conservation and management, 300, 309, 312, 313

Constituent assembly, 2, 4–6, 15, 28–30, 33, 44–62, 78, 113, 114, 311, 357, 373

Constitutional accountability, 11, 12, 15, 37, 60, 86, 135, 150, 152, 209, 274

Constitutional amendments, 6, 9, 13, 14, 72, 104, 105, 112, 113, 115, 116, 178, 236, 307, 342

Constitutional deviations, 395

Constitutional guarantees, 11, 17, 20, 89, 199, 214–226

Constitutional history, 46

Constitutionalism, 2–4, 10–14, 17, 20, 105, 133, 175, 249–263, 319, 325–327, 329, 331, 355

Constitutional law, 1, 3–8, 10, 11, 15, 18, 19, 133, 204, 250, 267–281, 326, 328, 330, 346, 357

Constitutional politics, 11, 69, 71, 150, 174, 175, 204, 285, 326

Constitutional principles, 19, 59, 84, 86, 327, 331, 332, 338–349, 406

Constitutional safeguards, 20, 144–153, 239, 368

Constitutional theory, 327

Constitution-making process, 14, 85

Constitution of Bangladesh, 1–20, 27–40, 45–47, 53, 62, 66, 68, 69, 71, 75, 84, 89–99, 109, 121, 124, 129, 131, 140–143, 165, 166, 187, 199, 201, 204, 207, 209–210, 219, 221, 222, 230, 257, 260, 261, 268, 273, 276, 283–296, 299–313, 320, 328, 330, 338, 347, 356, 368–383, 396, 401–419

Consultative process, 164
 Context and consultations, 45–47
 Corruption, 16, 37, 127, 144, 145, 147,
 149–150, 158, 161, 168, 171, 376
 Coup d'état, 214, 216, 225, 378
 Customary international law, 15, 84–99, 231,
 283, 288, 292, 307

D

Deinstitutionalised electoral reform,
 177, 181–184
 Democracy, 29–31, 33–37, 46, 48–53, 55–57,
 59, 62, 68, 69, 72, 75, 85, 86, 93, 96,
 104–111, 113, 115, 116, 122, 141,
 173–175, 178, 179, 187, 188, 209, 257,
 272, 273, 286, 380, 389, 398
 Democratic accountability, 12, 16, 121–136
 Democratic instrumental vision,
 175–177, 181–187
 Democratic vision, 175–177, 181, 184
 Digital constitutionalism, 19, 317–332
 Digital technology, 19, 319
 Disciplining mechanisms for judges, 162–171

E

Eastminster system, 13, 175–177, 181
 Economic development, 18, 19, 32, 91, 250,
 268, 275, 299–300, 310, 311, 348
 Economic rights, 47, 49–51, 58, 61
 Economic, social and cultural rights (ESCRs),
 5, 19, 28, 198, 339
 Election Commission (EC), 12, 16, 29, 35, 46,
 52, 59, 62, 108, 116, 174, 177–184,
 188, 375, 376, 394
 Election system, 181
 Emergency power, 20, 368–383
 Enforcement and exceptions, 230
 Environment, 9, 18, 19, 61, 96–99, 134, 140,
 176, 250–263, 270, 272–275, 280, 284,
 285, 300–304, 310, 312, 313, 319, 331,
 381, 402, 404, 406–408
 Eternity clause, 104, 109, 111–116
 Executive proclamation, 368, 371

F

Floor-crossing, 2, 12, 112, 124, 129, 136
 Foreign direct investment (FDI), 18,
 268–275, 280
 Fundamental principles, 5, 15–17, 19, 29–33,
 36, 44, 47–58, 66, 68–70, 72, 74, 92,
 95–99, 104, 107, 109–111, 114, 140,

143, 147, 198, 219, 254, 260, 268, 273,
 276, 290, 291, 302, 304, 338, 341, 347,
 348, 406

Fundamental rights, 5, 16–20, 29, 33, 35,
 38–40, 45, 49, 55–59, 84, 89–95, 99,
 106, 115, 139–143, 146, 148, 198–210,
 214, 219, 225, 230–246, 250, 252,
 255–259, 261–263, 272, 276, 277, 288,
 290–292, 296, 302, 312, 320, 326, 329,
 331, 338, 344–347, 356, 360, 369,
 372–374, 376–377, 380, 382, 383, 390,
 396, 402, 403, 406–408,
 410–414, 417–419

Fundamental rights enforcement, 19, 20, 35,
 39, 58, 142, 143, 148, 200, 225, 230,
 242, 259, 272, 290, 346, 360, 369, 372,
 374, 376, 377, 413–414

G

Good governance, 16, 58, 61, 139–153

H

Human rights, 6, 9, 10, 16, 18, 20, 31, 33, 36,
 37, 39, 46, 55, 56, 58, 61, 69, 71, 75,
 77, 84–87, 89–94, 96, 97, 99, 113,
 139–153, 198, 205, 210, 214, 216, 217,
 230–232, 235, 236, 238, 241, 245, 250,
 252, 253, 255, 272, 273, 275–280,
 284–287, 289–292, 300, 301, 319, 320,
 323, 325, 328, 331, 338, 342, 344, 350,
 368, 370–372, 374, 407, 414

I

Illiberal values, 174, 176, 179
 Influence of comparative constitutional
 law, 6–9
 Intellectual property rights, 267–281
 Intergenerational equity, 258, 304, 408
 International crimes, 17, 59, 87, 106,
 230–246, 396
 International law, 9, 14, 17, 19, 32, 84–92, 94,
 96–99, 143, 219, 230, 231, 233–236,
 238, 239, 241, 243–246, 250–252, 255,
 258, 268, 278, 279, 287, 288, 293, 296,
 320, 328, 346, 389, 397
 Internet, 19, 317–321, 323, 327, 328,
 330, 331

J

Judicial accountability, 16, 114, 158–171

Judicial activism-inactivism, 9, 19, 20, 146, 329, 408

Judicial Commission/Council, 76, 162, 164–165

Judicial enforcement, 19, 61, 143, 250, 254, 339–349

Judicial interpretation, 6–9, 19, 346

Judicial lawmaking, 20, 387–399

Judicial overreach, 408, 416–417

Judicial responses, 372, 381–382

Judicial review, 6, 8, 9, 19, 20, 105, 107, 114, 198, 209, 329, 354–357, 361, 362, 381, 391, 413

Judicial transplantations of comparative experience, 2

Judiciary, 6–9, 12, 13, 15, 17, 19, 29, 32, 35, 38, 45, 46, 50, 56–59, 61, 62, 84–86, 115, 116, 158–160, 162–165, 167, 170, 171, 174, 185, 203, 208, 217, 220, 225, 258, 260, 261, 263, 273, 290, 292, 296, 340, 343, 349, 371, 378, 388, 390, 395, 399, 402, 406, 414, 416, 419

Jus cogens, 89–93, 97, 99, 244

L

Lawmaking, 6, 20, 48, 121–123, 273, 388, 389, 394, 396–397, 399

Law reform, 271, 273, 274, 396–397

Legal commitments, 85

Legislative practice, 132–134

Legitimacy, 3, 12, 14, 15, 71, 104, 105, 111–115, 123, 135, 140, 176, 180, 202, 204, 209, 241, 246, 256

Local integration, 18, 284, 285, 292–296

Locus standi, 7, 9, 20, 261, 402–405, 407, 414–415, 417, 418

M

Marine living resources, 300, 311–313

Marine resources, 299, 300, 313

Martial law, 2, 15, 20, 28, 37, 59, 61, 73, 107, 110, 132, 134, 181, 185, 188, 208, 368–383, 389, 397, 399

Ministerial responsibility, 12, 124

Minority rights, 15, 65–80, 112

N

Nationalism, 28–30, 36, 48, 49, 53–55, 65, 68, 69, 72, 74, 75

Natural justice, 357, 361, 363

Non-discrimination, 17, 33, 89, 92–93, 99, 214, 219, 225

Non-justiciability, 19

Non-state actors, 86, 143–144

O

Ocean-dependent people, 18, 19, 300, 301, 311–313

Ocean governance, 18, 299–313

Ordinance endorsement, 131–132, 148

P

Parliament, 2, 8, 12, 13, 16, 28, 29, 33, 34, 36, 37, 47, 49, 50, 52, 53, 55–59, 62, 72–74, 87, 104, 106–108, 111, 112, 114, 115, 121–136, 143, 145, 146, 152, 162, 163, 165, 166, 179, 181, 186, 199, 236, 239, 242, 245, 278, 302, 306, 307, 344, 369, 371, 373, 374, 376, 378–383, 388–392, 394–397, 408, 416, 419

Parliamentary committees, 59, 62, 106–109, 122, 124, 126–128, 132, 135, 136, 187

Parliamentary democracy, 2, 11, 13, 34, 45, 57–59, 107, 129, 176, 179, 225

Parliamentary form of government, 4, 11–13, 121–123, 125, 163, 168, 378

Parliamentary oversight, 145–146

Participatory elections, 176, 177

Performance, 126, 127, 135, 145, 150, 151, 158–161, 164, 202

Political crises, 17, 125, 284

Politicisation, 15, 54, 60, 145, 150, 184, 185, 399

President, 12, 13, 33, 34, 39, 45, 55, 57, 62, 94, 106, 122, 131–133, 148, 152, 162, 163, 165–168, 170, 178, 182–186, 242, 261, 329, 370, 373–375, 378–380, 391, 395

Preventive representation, 174–181

Prime Minister (PM), 12, 13, 34, 57, 58, 62, 106, 109, 112, 115, 124, 125, 148, 152, 166–168, 182–184, 187, 295, 369, 374

Principle of legality, 240, 241, 329

Progression and transformation, 1–20

Proportionality test (PT), 17, 198, 199, 203–210

Protection of children, women, backward sections, 7, 214–226

Public administration, 144, 150, 223

Public complaints, 171

Public complaints mechanism, 171

Public interest litigation (PIL), 7, 9, 20, 251, 258–261, 263, 272, 273, 303, 394, 401–419

Public law and procedure, 354, 355, 357, 364

Public participation, 15, 103–116, 122, 130, 131, 134, 136, 185

R

Recognition, 17, 18, 52, 66, 74, 79, 84–99, 224, 249–263, 268, 270, 276–278, 289, 305, 349, 396, 401, 402, 405–406

Referendum, 15, 104, 105, 107–109, 111–113, 116, 177, 178

Reforms, 11–16, 18, 50, 55, 62, 66, 80, 130, 134–136, 144, 158, 174–177, 181–187, 267–281, 293, 302, 397

Refugee protection, 18, 283–296

Religious domination, 80

Removal of secularism, 70–72

Restrictions on fundamental rights, 15, 47, 199–201, 204, 210

Revival of secularism, 72–73, 78

Right to clean environment, 18, 250, 257, 259

Right to life, 7, 18, 89–95, 97, 99, 200, 252, 257, 259, 262, 263, 272, 290, 291, 296, 300–303, 311, 312, 340, 344–349, 376, 396, 402, 406, 407, 409

Right to privacy, 19, 218, 317–332

Rights of the nature, 19, 305

Rights of the people, 18, 299–313

Roadmap, 10–14, 20, 417–419

Rohingya, 18, 245, 283–296, 328

Rule of law, 1, 3, 6, 13, 14, 16, 20, 33, 36–38, 46, 55, 56, 71, 72, 75, 116, 133, 140, 141, 145, 150, 152, 153, 183, 201, 214, 272, 274, 319, 331, 355, 356, 368, 370–372, 382, 391, 405, 406, 410, 414

Rulemaking, 15, 84–86, 99

S

Safeguards, 18, 33, 35, 59, 97, 104, 134, 139, 141, 143, 200, 230, 239, 245, 246, 251, 257, 272, 290, 303, 310, 311, 323, 324,

356, 368, 369, 371, 372, 378, 382, 383, 411

Secularism, 2, 15, 29–31, 36, 48, 49, 53–55, 57, 65–80, 104–111, 115

Separation of powers, 6, 11, 13, 20, 114, 122, 147, 208, 313, 380, 390, 414

Sovereignty over natural resources, 89, 98, 99

State ownership, 18, 98–99

State policies, 5, 11, 15–17, 19, 29, 30, 33, 36, 44, 48, 51, 53, 54, 57, 65–80, 89, 92, 95–99, 111, 140, 143, 198, 219, 254–257, 260, 261, 263, 268, 273, 276, 290, 302, 304, 338, 347, 348, 406

State religion, 2, 15, 59, 65–80, 110, 111, 115

Supervisory role, 16, 127

Supreme Court, 7–9, 17–20, 34, 35, 52, 56, 59, 61, 68, 72, 78, 92, 94, 107–110, 114, 133, 143, 151, 152, 163, 165–171, 174, 185–187, 198, 217, 218, 222–226, 230, 231, 241–243, 251, 258–262, 272, 277, 278, 288, 291, 300, 302–305, 310, 329, 339, 342, 355–362, 364, 365, 370, 381, 387, 390, 392, 393, 397, 402, 413

Sustainable development, 17, 18, 145, 250, 252, 255, 258, 259, 263, 267, 273–275, 310, 408

T

Transparency, 127, 135, 144, 146, 147, 149, 183, 203, 204, 273, 324

Transparency International, 60, 144, 149

TRIPS Agreement, 276, 279–280

W

Way forward, 11–14, 261–263

Wednesbury unreasonableness test (WUT), 17, 198, 199, 202–203, 205–210

Women's rights, 9, 216–219, 410–411

World Trade Organization (WTO), 270, 276, 279

Writ jurisdiction, 19, 20, 35, 251, 354–365, 404, 413